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Doctoral Thesis

**An Analysis of Public-Private
Relationships in Trade Policy-
making**

통상정책 결정과정에서의 민관의 관계에 대한 연구

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ABSTRACT

International and national trade policies entail a discrepancy where businesses and other private actors are the main principals that are most affected by trade policies, but governments are the only agents who have the legitimate right to decide such policies. Under the early GATT system whose main purpose was to reduce tariff barriers, governments were accepted as the sole agent and multilateral trade negotiations were led in secret by a club of several developed countries. However, as the volume and the scope of international trade expanded, more attention was paid to the democratic process of trade policy-making which began to have increasingly extensive effects. Furthermore, the worldwide spread of democracy and globalization from the 1960s strengthened the need for transparency and public engagement in trade policy-making. The proliferation of regional free trade agreements since the late 1990s also became a significant momentum for private actors even in developing countries to be highly interested in trade policy at the domestic level.

Against this background, public-private relationships in trade policy-making both at the international and national levels have transformed and evolved in the direction of enhancing transparency. Countries may undergo change at a different speed in different ways, but the common objective of public-private relationships in trade policy-making is to enhance legitimacy and transparency in the decision-making process, maximize social welfare, minimize social conflict and costs, and achieve optimal distribution of resources.

Even though there have been much discussion on public-private

relationships in trade policy-making at the international and national levels, few analytical frameworks for studies have been suggested so far. Thus, this study attempts to introduce a framework which categorizes three levels of public engagement from transparency and consultation, to participation under three dimensions of trade policy-making processes of negotiations, ratification, and implementation. Based on this basic framework, three models of public-private relationships in trade policy-making are suggested: an open state-centered model, a consultation model, and a participation model. This approach can be applied to categorize each country under one of the three models or analyze a country's evolution from one model to another.

As a result of examining public-private relationships according to the aforementioned framework, the multilateral trade regime, or the WTO, seems to mainly focus on the first level of enhancing transparency. The WTO has made attempts to strengthen dialogue with businesses and civil society, but their power to affect the intergovernmental decision-making process is still indirect and limited. The dispute settlement body allows the opening of panels and Appellate hearings and the submission of *amicus curiae* in practice, but the rules on these issues are still under negotiation with no consensus among Member States. Meanwhile, some regional free trade agreements which involve the U.S. and EU already contain such rules in the text.

The U.S. has a long history of engaging private parties in its trade policy-making and most mechanisms of engagement have been institutionalized by trade laws. It is considered that the advisory committees established by the Trade Act of 1974 serve not only as advisors, but also as agenda-setters in trade policy. Furthermore, Section 301 of the Act allows private parties to petition their government and challenge trade barriers through dispute

settlement mechanisms. Such mechanisms reveal that the public-private relationship in the U.S. is close to the participation model. On the other hand, the EU's public engagement in trade policy-making is a more principle-based and policy-based system, and it can be categorized as a consultation model with the exception of the TBR. Both the Trade Civil Society Dialogue and the General Principles and Minimum Standards for consultation provide clear guidelines for enhancing transparency and consultation in the trade policy-making process, but not for participation of non-state actors.

Korea, whose economy has rapidly developed with heavy dependence on trade, has recognized the importance of public-private relationships in trade policy-making through more than 10 years of experience in concluding free trade agreements. In order to enhance transparency in the process of trade policy-making, Korea has enacted the Trade Treaty Conclusion Procedure Act and institutionalized public hearings and established a private advisory committee. In addition, the Domestic Measures Committee for Trade Treaties was also established to help the ratification process of trade agreements. Despite these efforts to institutionalize public engagement in trade policy-making, it seems there is not enough concrete activity taking place at the level of consultation, and excessive compensation packages are still offered to veto players in the process of ratification, which hampers optimal distribution of resources. Therefore, the current public engagement in trade policy-making in Korea can be described as a 'transition-to-consultation model'.

In conclusion, the analyses based on the framework suggested by this study have demonstrated that it is useful for examining the level of public engagement of and within a country, and also for conducting comparative studies across countries. They are also meaningful in that they will contribute

to facilitating further systemic and analytical studies on public-private relationships.

Keywords: Trade Policy, Trade Negotiations, Public-Private Relationships, Transparency, Consultation, Participation

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LIST OF ACRONYMS

AB	Appellate Body
ACTPN	Advisory Committee for Trade Policy and Negotiations
APAC	Trade Agricultural Policy Advisory Committee
ATAC	Agricultural Technical Advisory Committee
COECE	Coordinating Body of Foreign Trade Business Association
CSOs	Civil Society Organizations
DOC	Department of Commerce
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
EESC	European Economic and Social Committee
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICJ	International Court of Justice
IERD	Information and External Relations Division
IGPA	International Generic Pharmaceutical Alliance
IMF	International Monetary Fund
IP	Intellectual Property
IPC	Intellectual Property Committee
ITAC	Industry Trade Advisory Committees
ITO	International Trade Organization
KITA	Korea International Trade Association
MAI	Multilateral Agreement on Investment
MOTIE	Ministry of Trade, Industry and Energy

NAFTA	North America Free Trade Agreement
NCPI	New Commercial Policy Instrument
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
OMT	Office of the Minister of Trade
RTA	Regional Trade Agreement
SIA	Sustainability Impact Assessment
TBR	Trade Barriers Regulation
TNC	Trade Negotiations Committee
TRIPS	Trade-Related Aspect of Intellectual Property Rights
TPA	Trade Promotion Authority
TPC	Trade Policy Committee
TPP	Trans-Pacific Partnership
TPRG	Trade Policy Review Group
TPRM	Trade Policy Review Mechanism
TPSC	Trade Policy Staff Committee
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union of Industrial and Employers' Confederation of Europe
USITC	United States International Trade Commission
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Chapter 1

Introduction

1.1 Public-Private Relationships in Trade Policy-making

In the preamble of the General Agreement on Tariffs and Trade (GATT), twenty-three countries recognized that “their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”¹ For these objectives, they agreed to reduce tariff and non-tariff barriers to trade and to eliminate discriminatory treatment in international commerce. Even though businesses and other private actors are the ultimate principals that are most affected by such an agreement in the area of international commerce, governments have been the ‘only’ actors as agents which are involved in trade negotiations and represent the interests of businesses and the public as contracting parties. This discrepancy between an agent, which decides trade policies and rules, and an economic principal, which is affected by those regulations, characterizes and shapes the nature of trade policy-making mechanisms.²

¹ The General Agreement on Tariffs and Trade, 1947.

² For more discussion on the principal and agent relationship, see John W. Pratt and Richard J. Zeckhauser ed., (1985), *Principals and Agents: The Structure of Business*, Boston: Harvard Business School Press. The concept of the agency relationship was originally derived from the field of business, but Pratt and Zeckhauser suggested that understanding of the agency relationship can provide insight into broader questions, one of which is on the appropriate roles

While international trade negotiations under the GATT focused on the reduction of tariff barriers, it was unlikely that the issue of principal-agent discrepancy would arise. Moreover, it was fairly accepted that nation-states were rational and thus, they were the appropriate actors for negotiating international trade norms as they were in the international political arena. However, as Capling and Low has stated, “the days when trade policy decisions were made only by governments are gone”³ and the main principals, or the non-state actors of international commerce began to raise their voices and claim their interests in the domestic and in the international trade decision-making process. It was businesses that first began to actively engage themselves in the trade policy-making process at the domestic level under the GATT and the World Trade Organization (WTO). The interactions between governments and businesses have thus, progressively changed and evolved for many years, but at a different speed and in its own way in each country. Additionally, non-governmental organizations (NGOs) or civil society organizations (CSOs) whose concerns focus on issues such as the environment, labor rights and negative effects of globalization began to raise their concerns in trade policy-making at both the domestic and international levels.

When NGOs blocked the multilateral trade policy-making process at the Seattle Ministerial Conference in December 1999, a need for engaging non-state actors was seriously recognized. Thereafter, more attention was paid to the role of non-state actors in the trade policy-making process and their interactive relationships with both their governments and the WTO. Moreover,

of the private and public sectors as agents of the citizenry in providing for their welfare. The economic principal-agent theory has been also applied to political science.

³ Ann Capling and Patrick Low ed. (2010), *Governments, Non-State Actors and Trade Policy-Making*, NY: Cambridge University Press, p.1.

since the proliferation of bilateral or regional free trade agreements (FTAs) in the late 1990s, private sectors in each country became more actively involved in the trade policy-making process and negotiations and therefore, public and private relationships in the domestic arena also became an important and meaningful issue of discussion.

The discrepancy in the international trade regime arising from the reality that governments are the agents that decide trade policies on behalf of non-state actors cannot be removed as long as the state remains as the sole actor in the international trade system. However, this discrepancy issue has now caused a big challenge not only to the multilateral trade system itself, but also to domestic trade policy-making processes as we have seen in events such as the Seattle debacle, and domestic turmoil and social conflict surrounding trade policies.

Accordingly, the WTO and many governments have attempted to engage private actors in the process of trade policy-making by formalizing or institutionalizing public engagement mechanisms in various ways.

1.2 Purpose and Scope of Study

Ever since the establishment of the WTO, there have been many scholarly debates and studies on the WTO's engagement with non-state actors in the context of transparency and legitimacy of its decision-making process and dispute settlement procedure. Such discourses have paid more attention to the WTO's relationships and interactions with civil society, referred to as NGOs.⁴

⁴ For more discussion on the relationship of the WTO with NGOs, see Gabrielle Zoe Marceau and Peter N. Pedersen (1999), 'Is the WTO open and transparent? : a discussion of the

On the other hand, there have been insufficient research and studies on public-private relationships in trade-policy making process at the national level, where interactions between the two parties begin. Since more countries are involved in bilateral or regional free trade agreements, which are legitimate exceptions under the umbrella of the WTO, more attempts have been made to explore and study how non-state actors affect trade negotiations and what their role is in domestic trade policy-making. However, studies on these issues are still in the beginning stage and many previous policy papers and literature seem to present descriptive findings based on country-specific case studies, rather than analysis within a framework. Furthermore, there have been few research and studies that deal simultaneously with public-private relationships at both the international and domestic levels. In this regard, Hocking has emphasized that “a multifaceted approach spanning national and international policy milieus” is required because trade policy-making processes at the international and national levels are inseparably linked to each other.⁵

Therefore, this study will focus on two levels of public-private relationships under the multilateral trade system and within each state's domestic trade policy-making process, which is vitally important in dealing with issues arising from the discrepancy between decision-makers and those affected by their decisions in the international trade arena. There could be many forms of public-private relationships, formal or informal, according to phases and stages of trade policy-making and levels and degrees of engagement. Thus, this study will first attempt to introduce a framework with

relationship of the WTO with non-governmental organizations and civil society's claims for more transparency and public participation', *Journal of World Trade* 33(1): 5-49.

⁵ See Brian Hocking (2004), 'Changing the terms of trade policy making: from the 'club' to the 'multistakeholder' model', *World Trade Review* 3(1): 3-26, p.4.

which today's formal and institutionalized public engagement mechanisms can be analyzed both at the international and national levels.

The latter part of this study will, however, focus more on public-private relationships at the domestic level, to which relatively less attention has been paid to so far. In this regard, Putnam has developed a conceptual framework for understanding how diplomacy and domestic politics interact.⁶ It is very noteworthy that he has highlighted a national level of international negotiations and explained how preferences of domestic constituency such as political parties, social classes, interest groups, legislators, and public opinion and their coalitions form the size of win-sets⁷ which affect international negotiations. Thus, the two-level game approach has been applied in many literature for analyzing international negotiations. Unlike state-centric theories, it explains well how preferences and interests of economic and noneconomic private actors affect international negotiations. However, his approach is suitable only for the analysis of '*international negotiations*,' not for the whole process of trade policy-making. It does not address the role of private actors and their interactions with trade policy-making authorities, which this thesis mainly focuses on. The purpose of this study is not to examine the domestic

⁶ Robert D. Putnam (1988), 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', *International Organizations* 42(3): 427-460. Putnam attempted to analyze international negotiations as a two-level game: one is a national level (Level II) at which domestic groups pursue their interests and politicians see power by constructing coalitions and the other is an international level (Level I) at which national governments seek to maximize their own ability to satisfy domestic pressures.

⁷ Putnam has defined the "win-set" for a given Level II constituency as the set of all possible Level I agreements that would "win", that is, gain the necessary majority among the constituents-when simply voted up or down. For better understanding, he has explained that larger win-sets make Level I agreement more likely, *ceteris paribus* and the relative size of the respective Level II win-sets will affect the distribution of the joint gains from the international bargain. The win-set is determined by three factors: the distribution of power, preferences, and possible coalitions among domestic constituents, political institutions, and negotiators' strategies.

level of international trade negotiations, but to analyze public engagement mechanisms in order to explore ways for building a better relationship between public and private actors.

Building better public-private relationships is not only important in trade policy-making, but in policy-making as a whole. However, there are some reasons why public-private relationships in trade policy-making are distinctively significant. The results of domestic trade policy and internationally agreed norms for trade directly and extensively affect production and trade activities of private actors, mostly businesses and thus, their interests. While national boundaries are becoming blurred in world trade, nation-states continue to be the sole decision-makers in trade policy. Therefore, compared to other fields of national security, domestic policies and regulations, private actors and their information, advice, and expertise are more crucial for trade-policy making.

This paper is organized as follows. In Chapter 1, main concepts that this study addresses will be defined to further clarify the scope of the thesis. Chapter 2 will examine the background for why and how public-private relationships in trade policy-making became an important issue. The ultimate goals of public-private relationships in trade policy-making will also be discussed. The last part of Chapter 2 will suggest a framework, based on which public-private relationships in trade policy-making at the international and national levels will be analyzed. This attempt will be a major contribution to the discussion on public-private relationships in trade policy-making.

Chapter 3 will examine public-private relationships in trade policy-making respectively at the international and national levels. First, the historical evolution and the current state of public engagement at the

international level, more specifically at the WTO, will be addressed. Since the WTO was criticized due to its lack of legitimacy from its establishment, there have been many discussions and studies on the issue of legitimacy deficit in the WTO. By reviewing them, the WTO's efforts to enhance its legitimacy through the engagement of private actors will be examined. In addition, the current system of public engagement in the WTO will be analyzed according to the aforementioned framework.

Chapter 4 will deal with public-private relationships in trade policy-making at the national level and mechanisms for public engagement in trade policy-making in the U.S. and the EU. The reason why the U.S. and the EU were chosen is because the U.S. has a long history of legalized public engagement focusing on trade policy, while the EU has established a principle-based and policy-based system of public engagement. Based on the examination of their mechanisms for public-private relationships in trade policy, the latter part of Chapter 4 will analyze two types of public engagement in the U.S. and the EU based on the framework suggested in Chapter 2.

In Chapter 5, public engagement in trade policy-making in Korea will be reviewed. Korea has developed rapidly by relying on trade, and its export-oriented policies have been led by government officials for a long time. However, since Korea experienced severe social opposition during negotiations on its first free trade agreement with Chile, the Korean government recognized the need to engage private parties in the process of trade policy-making. Since Korea is considered to be a model for developing countries in terms of trade policy, reviewing Korea's system will provide meaningful implications for public-private relationships in trade policy-

making at the national level. Some mechanisms for engaging private parties, which Korea has formally established, will first be explained and then analyzed under the aforesaid framework.

Finally, Chapter 6 will discuss the implications of this thesis, suggest a future agenda for further study, and provide a conclusion.

1.3 Definitions

To begin, it is necessary to define the concepts of key terms to clarify the scope of this study. First, the scope of ‘trade policy’, which this study is focused on, needs to be clarified. A trade policy or international trade policy means all the rules and regulations in international trade. A trade policy includes not only taxes imposed on imports and exports, tariffs, quotas, and trade remedy measures, but also rules and regulations on services, investment, intellectual property rights, and technical and sanitary measures. It actually encompasses all domestic rules and regulations that can affect trade. Trade Policy Reviews⁸ of all WTO members reveal that there are many measures affecting imports and exports in each country. Among various forms of trade policies, this study, however, tries to focus on trade policies that are relevant

⁸ The Trade Policy Review Mechanism (TPRM) was a result of the Uruguay Round. Article III of the Marrakesh Agreement placed the TPRM on a permanent footing as one of the WTO’s basic functions. The mandate of the TPRM was broadened to cover services trade and intellectual property. The objective of the TPRM is to facilitate the smooth functioning of the multilateral trading system by enhancing the transparency of Members’ trade policies. All WTO Members are subject to review under the TPRM. The Annex mandates that the four Member with the largest shares of world trade (the EU, US, Japan and China) be reviewed each two years, the next 16 be reviewed each four years, and others be reviewed each six years. Reviews are conducted by the Trade Policy Review Body (TPRB) on the basis of a policy statement by the Member under review and a report prepared by economists in the Secretariat’s Trade Policy Review Division. For more information, refer to the WTO website at https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

to international trade agreements and arrangements, which entail trade negotiations, domestic ratification and implementation of the agreements.

Second, the meaning of ‘private actors’ or ‘non-state actors’ broadly includes individuals, businesses, business and industry organizations, workers, non-profit organizations and civil society as a whole. Here, ‘civil society organizations (CSOs)’ will be used in a narrower sense, excluding businesses and other profit-making entities. There is no commonly accepted definition of CSOs and each institution or organization has its own definition. The United Nations (UN) defines civil society as the third sector of society, along with government and business, which comprises of civil society organizations and non-governmental organizations.⁹ The World Bank explains that “the term civil society refers to the wide array of non-governmental and not-for-profit organizations that has a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.”¹⁰ Therefore, CSOs include community groups, NGOs, labor unions, indigenous groups, professional associations, and foundations. Among those included in CSOs, the term NGO means ‘a voluntary group of individuals or organizations, usually not affiliated with any government, which is formed to provide services or to advocate a public policy.’¹¹

⁹ See Definition of Civil Society at <http://www.un.org/en/sections/resources/civil-society/index.html>

¹⁰ See Defining Civil Society at <http://web.worldbank.org/>. The World Health Organization (WHO) also introduces the meaning of civil society and CSOs in its website. It states that CSOs is a wide range of organizations, networks, associations, groups and movements that are independent from government and that sometimes come together to advance their common interests through collective action.

¹¹ The definition of nongovernmental organization (NGO) is quoted in Encyclopedia Britannica. The WHO introduces the meaning of NGOs in its website: The term ‘NGOs’ is used to describe non-profit making, non-violent organizations, which seek to influence the policy of governments and international organizations and/or to complement government services (such

Private actors, private parties, non-state actors, and citizens will be used interchangeably with interested parties or stakeholders in this paper. In this regard, a non-exhaustive list of stakeholder categories illustrated in Table 1, which the European Commission introduces in its Guidelines on Stakeholder Consultation, is useful to understand the scope.

Table 1. Stakeholders Categories (non-exhaustive list)

Citizen/individual	
Industry/business/workers' organization	Multinational/global National Small and Medium-sized Enterprises Business Organization Trade Union Chamber of commerce
Platform, network, or association	Representing for-profit interests Representing not-for-profit interests Representing professions

Source: Commission Staff Working Document, 'Better Regulation Guidelines', EU Commission

It is also necessary to clarify the term '*participation*'. Many scholars have used 'participation' in a broad range and thus, '*public participation*' is often used in relation to interaction between public and private actors. In this regard, Bonzon has defined 'public participation' as a term that includes "all institutionalized forms of interaction in the decision-making process between organs of an institution and external actors that are independent of any

as health and education). They usually have a formal structure, offer services to people other than their members. On the other hand, Perez-Esteve explained that the use of the term NGOs within the present WTO context comprises public action NGOs, trade unions, and business associations and the wider concept of civil society refers to, amongst others, professional associations, coalitions and advocacy groups, citizen's networks, NGOs and the general public. See Maria Perez-Esteve, 'WTO Rules and Practices for Transparency and Engagement with Civil Society Organization', *WTO Staff Working Paper* ERSD-2012-14, WTO.

governmental entities.”¹² He has also explained that public participation includes two dimensions-the ‘transparency’ of a decision-making process and the ‘engagement’ of non-state actors in the process-and implied that such engagement can be referred to as ‘actual participation.’

This study will, however, use the term ‘participation’ in a narrow scope under the analytical framework in Chapter 2 to describe “a formal or institutionalized mechanism for private actors to have an opportunity to be heard and present their views.” Accordingly, the term ‘public participation’ which Bonzon defined will be replaced by ‘public engagement’ or ‘non-state actor involvement’ in this paper. This is because there is no appropriate substitute for a narrower meaning of ‘participation’. This will be discussed more in detail in the relevant section.

¹² Yves Bonzon (2014), *Public Participation and Legitimacy in the WTO*, Cambridge: Cambridge University Press, p.4.

Chapter 2

Understanding Public-Private Relationships in Trade Policy-making

2.1 Background of Public-Private Relationships in Trade Policy-making

International trade has a long history, but it was not until the Second World War that the necessity to establish a worldwide trade regime was recognized for the first time. Even though the first attempt to create the International Trade Organization (ITO) ended in failure, the General Agreement on Tariffs and Trade (GATT) was agreed upon by twenty-three nations in 1947, which is the predecessor of the WTO. When the GATT was born, nation-states were the main and only actors which were involved in negotiations and decision-making processes for establishing international bodies and institutions, and for governing not only international politics, but also international economy and trade. Keohane and Nye have described such governance of inter-governmental organizations right after World War II as “the club model of multilateral cooperation” and pointed out that “these international regimes were constituted by rules and norms that governed their members’ relationships in specific issue areas of international relations.” They have also explained that such “weak devices for cooperation, dominated by states, operated as clubs of negotiators, often technically trained, bargaining with one

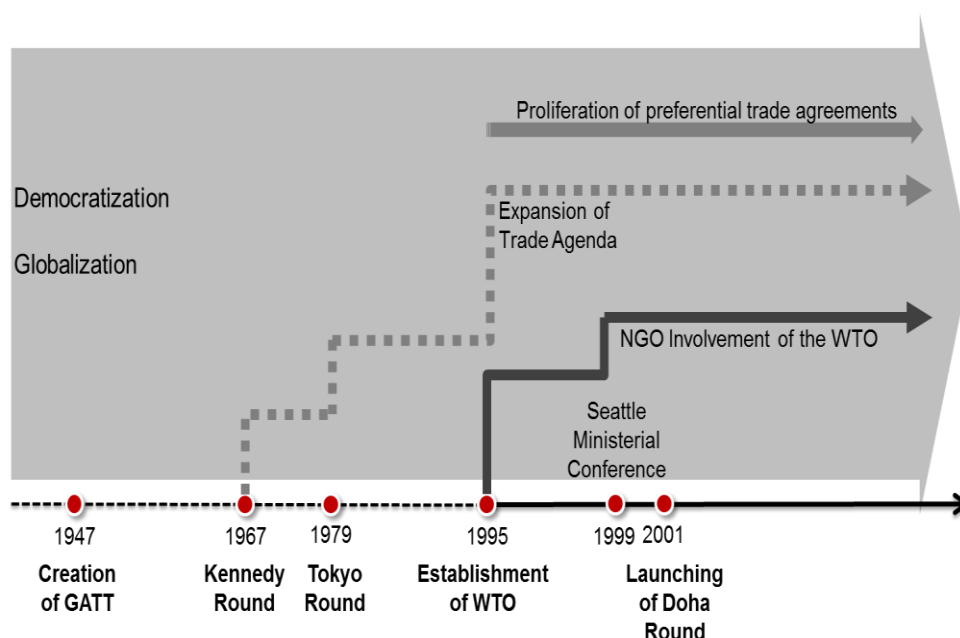
another within specified issue areas.”¹³ The international trade regime was also operated in a closed environment and dominated by government officials and technocrats. In this regard, Dymond and Hart have stated that trade policy was included in ‘low’ politics, which was the realm of technical issues rather than political ones mainly because “the Cold War ensured that peace and security would be the crux of high policy and the main determinant of relations among States.”¹⁴ Likewise, trade policy-making was regarded as a monopolized area for nation-states and in the hands of government officials for quite a long time, but the environment of trade policy began to change and has rapidly transformed since the 1990s as illustrated in Figure 1.

Before discussing the analytical framework on the public-private relationships in trade policy-making processes, it is necessary to begin with an overview of how the environment of trade policy has been changing and how these changes have affected public-private relationships in trade policy-making. The changes summarized in Figure 1 will be explained more in detail.

¹³ Robert O. Keohane and Joseph S. Nye Jr. (2001), ‘Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’, John F. Kennedy School of Government, *Harvard University, Faculty Research Working Papers Series*.

¹⁴ William A. Dymond and Michael M. Hart (2000), ‘Post-Modern Trade Policy, Reflections on the Challenges to Multilateral Trade Negotiations After Seattle’, *Journal of World Trade* 34(3): 21-38, p.30.

Figure 1. Changing Environment of Trade Policy-making



Source: Summarized by Author

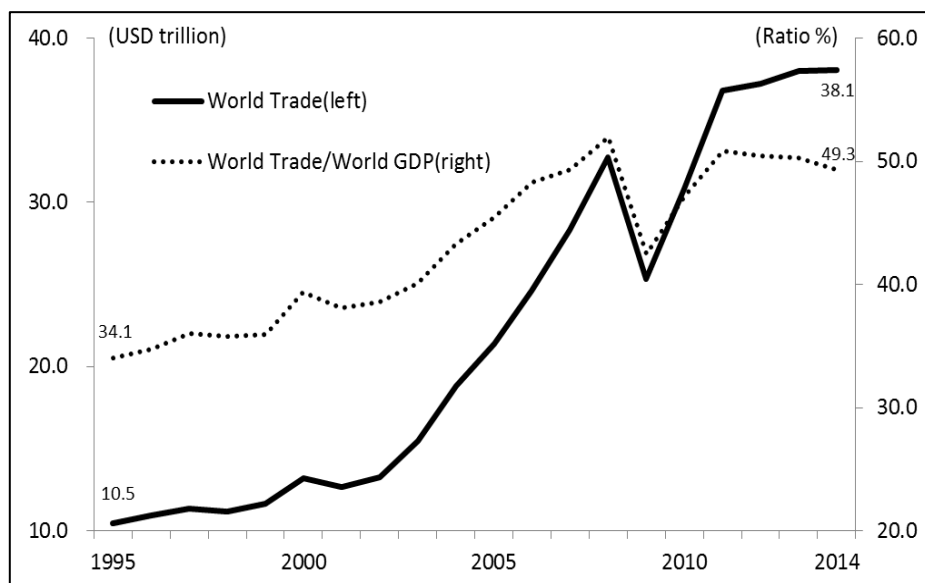
2.1.1 Changing Environment of Trade Policy-making

2.1.1.1 Expansion of Trade in Volume and Agenda

The first reason for transformation of the trade policy environment was change in trade itself. After World War II and the ensuing independence of colonies, more countries became increasingly dependent on trade and many countries, mostly Asian countries, adopted trade-oriented economic development plans. The ratio of trade to GDP (Gross Domestic Product) in many countries continued to increase and trade in the world economy also became significant. According to the WTO, trade volumes have increased

two-and-a-half times since the WTO's launch and by a 37-fold since the GATT's creation, which outstrips growth in world output as shown in Figure 2.¹⁵ Trade policy has therefore affected the entire economy and became more important to governments.

Figure 2. Increase of World Trade and World Trade/GDP Ratio



Source: Calculated based on WTO trade statistics and IMF World Economic Outlook Database

As trade increased in volume and expanded in geographical scope, more businesses became involved in trade and grew concerned about trade policies that were directly or indirectly related to their activities. They naturally paid more attention to trade policy-making and tried to make their voices heard and reflected in the decision-making process. As trade gained weight, as Dymond and Hart noted, trade and economic issues transformed

¹⁵ WTO (2015), *The WTO at twenty - Challenges and achievements*, Geneva: WTO, p.9.

into high politics.¹⁶ The end of the Cold War with the collapse of the Soviet Union in 1991 further accelerated this transformation.¹⁷

Trade not only increased in volume but also expanded in agenda. As set out in the preamble of the GATT, its foremost objective was to remove tariff barriers and other barriers to trade, mostly related to trade in goods. It was not until the sixth negotiation, called the Kennedy Round (1964 to 1967) that trade agenda expanded from traditional tariff cuts to new trade rules, such as those on the use of anti-dumping measures. The next negotiation, titled the Tokyo Round (1973 to 1979) included a broader scope of trade rules than its predecessor, such as the application of countervailing and antidumping duties, and separate agreements on trade in civil aircraft and government procurement.

It was during the Uruguay Round (1986 to 1994) when the scope of the trade agenda unprecedentedly expanded. The trade agenda went beyond border issues, which were mostly tariffs, and included behind-the-border issues such as trade in services, intellectual property rights, technical barriers, and sanitary and phytosanitary measures. After the Uruguay Round, the expansion of the trade agenda went far beyond to include environmental and labor standards as set out in the text of some regional trade agreements, which had previously been regarded as non-trade issues.

Such expansion of the trade agenda required the involvement of more actors within governments as well as non-state actors. Only a few government departments such as industry, finance or foreign affairs had participated in trade negotiations and the trade policy-making process for many years, but multiple departments and agencies were now required to

¹⁶ Dymond and Hart (2000), p.31.

¹⁷ WTO (2015), p.31.

involve themselves in the expanded trade agenda. However, even though more government agencies began to participate in trade policy-making, they could not effectively deal with the variety of trade-related issues, especially when technical and specific knowledge and information were needed. Hocking has explained this as a ‘knowledge deficit’ where government officials in charge of trade negotiations need advice and information from the business community or civil society.¹⁸ Likewise, trade policy-making, which used to be in the realm of governments, became so complicated that not only the multilateral trade body, but also governments came to recognize the necessity of consultations and cooperation with a variety of non-state actors.

2.1.1.2 Democratization and Globalization

Trade policy-making cannot be insulated from democratization and globalization in both the national and international arenas. As many countries went through political democratization in their own way and at their own pace, voices urging participation in policy decision-making processes were raised or at least, demands for more transparent policy-making increased at the domestic level. In the field of trade, industries or labor unions, which had to compete with imports or were negatively affected by trade liberalization became important actors who influenced domestic trade policy. In the same vein, those who supported market opening for export or investment, pushed their government to take on a more liberalized trade policy. Under a democratized system, more stakeholders tend to want to be ‘*engaged*’ in the

¹⁸ Hocking (2004), p.8.

decision-making process, and the government therefore needs to ‘*coordinate*’ their diverse and, very often, different interests.

The issue of democracy was also raised in the context of global governance. According to Keohane and Nye, the ‘club model’ of multilateral cooperation in international institutions after World War II was regarded as an efficient type of governance because only a very limited number of government officials from a small number of developed countries were involved in negotiations. They have explained that under the club model, a lack of transparency to functional outsiders was a key to political efficacy.¹⁹ However, the club model of multilateral governance became a target of criticism as democratization pervaded into the global arena along with the growth of globalization. Keohane and Nye have pointed out that three developments undercut the club system. The first development was the expansion of membership from developed to developing countries within international institutions, and the second was the proliferation of non-state actors generated by globalization. Among many non-state actors, a number of NGOs of various fields were established and they increasingly raised strong voices on the agendas and decision-making processes of international organizations. The failure of the Multilateral Agreement on Investment (MAI) at the Organization for Economic Cooperation and Development (OECD) demonstrated that a well-organized campaign by non-state actors played a role in blocking the multilateral trade negotiations.²⁰ Their activities culminated in the Seattle Ministerial meeting of the WTO in November 1999. The third

¹⁹ Keohane and Nye (2001), p.5.

²⁰ For detailed discussion on the MAI negotiations, see Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins (2006), *Case Studies in US Trade Negotiation Vol. 1: Making the Rules*, Washington D.C : Institute for International Economics.

development was the spread of democratic norms and attempts to implement them at the international level.²¹

International institutions including the WTO were thus, faced with the issue of ‘democratic legitimacy’ and were often accused of having a ‘democratic deficit’. Even though many scholars admit that international institutions cannot have democratic legitimacy as domestic governments do largely due to their lack of constituencies, there have been many studies and literature on the democratic deficits of international organizations. Thus, the WTO responded by creating and establishing informal or formal mechanisms to enhance its transparency, and channels to communicate and consult with non-state actors. Many argue, however, that the WTO is still relatively less transparent and legitimate in their decision-making process and especially, its well-known dispute settlement procedure, than other international institutions.²²

²¹ Keohane and Nye (2001), pp.7-9.

²² In this regard, the comparative analyses have done by Peter Van den Bossche (2008), ‘NGO Involvement in the WTO: A Comparative Perspective’, *Journal of International Economic Law* 11(4): 717-749. In his conclusion, he stated that “while NGO involvement in the WTO definitely has its limits, the involvement of NGOs in other international organizations, in particular in the United Nations, suggests that these limits have not been reached as yet.” Also refer to Part III: Implementing public participation in Bonzon (2014). He compares public participation’s modalities in the WTO with other international organizations such as International Labor Organization (ILO), Association of Southeast Asian Nations (ASEAN), World Intellectual Property Organization (WIPO), and Organization for Economic Cooperation and Development (OECD).

2.1.1.3 Proliferation of Regional Free Trade Agreements

Although more than 160 countries are now members of the WTO and its membership is still expanding, not all countries have strong voices and roles in multilateral negotiations. Although the GATT was initially signed by twenty-three countries including both developed and developing countries, rich countries mostly had set the agenda and taken a leading role in the following rounds of trade negotiations. Even after launching the WTO in 1995, there has been a tradition where a limited number of big trading countries hold informal meetings, which are called ‘green room’ consultations.²³ Under these circumstances, many developing countries have been detached from the decision-making process within the WTO and were lacking core information. Therefore, non-state actors of these countries felt more removed from the multilateral negotiations and found less incentive to engage in the trade policy-making of their governments. Non-state actors in relatively small to medium trading countries have been very defensive rather than proactive about decisions made at the WTO and in engaging in the process at both the domestic and international levels.

However, with the worldwide proliferation of free trade agreements in the late 1990s, the situation has changed considerably. Developing countries’ negotiations with the United States on their free trade pacts have triggered non-state actors’ interests and their proactive engagement in trade policy-making. In this regard, Capling and Low have pointed out that

²³ Patrizia Nanz and Jens Steffek (2004), ‘Global Governance, Participation and the Public Sphere’, *Government and Opposition* 39(2):314-335. They explain that the infamous ‘green room’ consultations at the Ministerial Conferences have become a synonym for obscure and secretive ways of international decision-making.

consultative processes first arose in relation to preferential trade agreements rather than WTO negotiations.²⁴ This is because countries which are involved in bilateral or regional free trade agreements should, regardless of their status in trade, negotiate directly with each other, and not freeloader off the back of the developed countries, as they have in multilateral negotiations.

During the two decades since the establishment of the WTO, regional free trade agreements (RTA) have rapidly increased. According to the Regional Trade Agreement database on the WTO website, more than 284 RTAs are in force.²⁵ Now more than 200 countries have concluded more than one regional free trade agreement. In many developing countries, which have not played a weighted role in the multilateral trade regime, non-state actors' participation in trade policy was recognized and the institutionalization of communication channels with them was initiated when they began to engage themselves in FTA negotiations. In Chile, which is one of the countries that have actively concluded many FTAs, non-state actors became more involved in the negotiation process since the late 1990s, coinciding with Chile's negotiations on its first preferential trade agreement. Participation by private parties in Chile evolved more as a result of FTA negotiations with MERCOSUR and Canada, and this phenomenon peaked during Chile's simultaneous negotiations with the United States and the European Union.²⁶ The same is also true for Korea, whose case will be analyzed in Chapter 5. There have been much opposition and demonstrations against the opening of its agricultural market as a result of the Uruguay round, but even under this

²⁴ Ann Capling and Patrick Low, 'The domestic politics of trade policy-making: state and non-state actor interactions and forum choice,' in Ann Capling and Patrick Low eds. (2010)

²⁵ For statistics on RTAs, see <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

²⁶ For Chilean experience of private participation in trade policy, See Sebastian Herreros's case study on Chile in Ann Capling and Patrick Low eds. (2010).

circumstance, no meaningful attempts to consult with stakeholders were made at the time. However, since Korea's first FTA with Chile, non-state actors became much more knowledgeable about trade negotiations and the Korean government began to recognize the need to engage private parties in its trade policy-making.

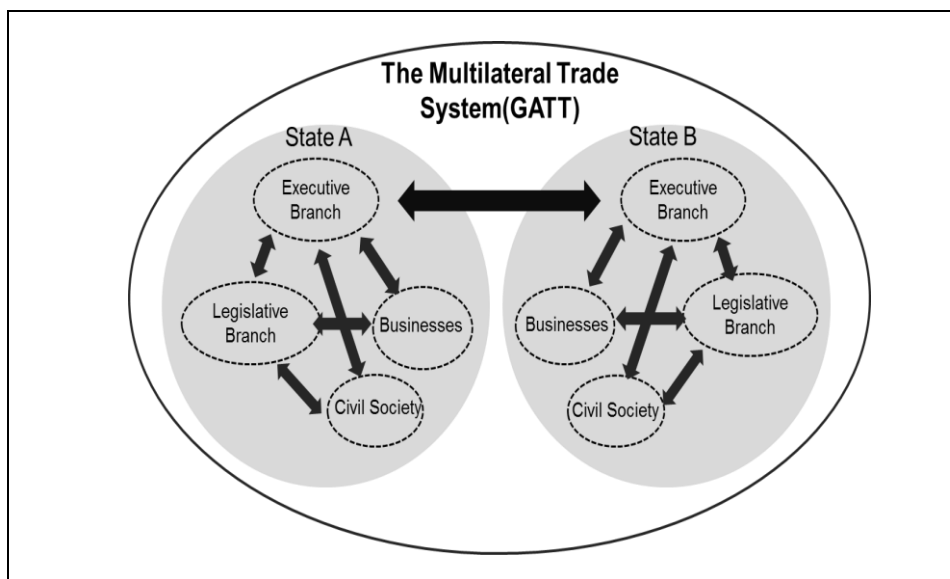
2.1.2 Evolution of Public-Private Relationships at the National and International Levels

It is against this background that state-centered trade politics has gradually transformed and the range of participants involved in trade policy expanded. Trade policy-making under the GATT system was relatively simple as shown in Figure 3, because states were regarded as the only actors in the international trade arena. As Marceau and Pedersen have observed, GATT member countries regarded themselves as the only actors in the forum and insisted that their activities be handled in a pragmatic manner and therefore, non-governmental actors had no presence in the negotiations.²⁷ Some non-state actors including businesses and civil society began to interact with their legislative body and executive branch even in the early years of the GATT, but this relationship did not go beyond the national boundaries. Furthermore, it had a limited effect on the decision-making process due to their governments' political system and bureaucratic decision-making style. Under these circumstances, there was not much room to discuss public-private

²⁷ Gabrielle Marceau and Peter N. Pedersen (1999), 'In the WTO Open and Transparent? A discussion of the relationship of the WTO with non-governmental organizations and civil society's claims for more transparency and public participation', *Journal of World Trade* 33(1): 5-49, p.5.

relationships at the international level since they were shadowed by inter-state interactions and negotiations, and it was the member states' responsibility to interact with their constituencies and develop their own relationships with non-state actors. Public-private relationships at the national level varied, however, according to many determinants including political structure and culture, distribution of power, and degree of democratization of the whole society. In particular, for developing countries in which economic development prevailed over democratization under authoritarian leadership, trade policy-making was a bureaucratic 'top-down' process as many other policy-making processes were. Therefore, there were no public-private relationships that were well-developed and maintained as they were in developed countries.

Figure 3. Public-Private Interaction under the GATT



Source: Author's analysis

When it comes to public engagement in trade policy-making at the international level, the establishment of the WTO transformed the whole

picture. The main WTO structure is composed of a Ministerial Conference and a General Council, both of which consist of representatives of all Members. The Ministerial Conference is held at least once every two years and its functions are conducted by the General Council in the intervals between its meetings.²⁸ Another meaningful achievement was the establishment of the dispute settlement body which has the authority to establish panels, and adopt panel and Appellate Body (AB) reports.²⁹ Under this dispute settlement system, only Member states can initiate the process, and request for the adoption of panel or AB reports.

Even if the main actors in the WTO remain as the Member states as abovementioned, the WTO has become a formal legal personality with its own Secretariat. The WTO Secretariat is very limited in its power, but exclusively international in character and does not receive instructions from any government.³⁰ Based on the WTO's legal personality and the Secretariat's international character, it became possible for non-governmental actors, especially international NGOs, to go beyond its national boundaries and interact directly with the WTO on international trade policies, and the Secretariat took the important role of developing relationships with them. In this regard, the Guidelines for Arrangements on Relations with Non-Governmental Organizations in 1996 also clarified in Article IV that "the Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the

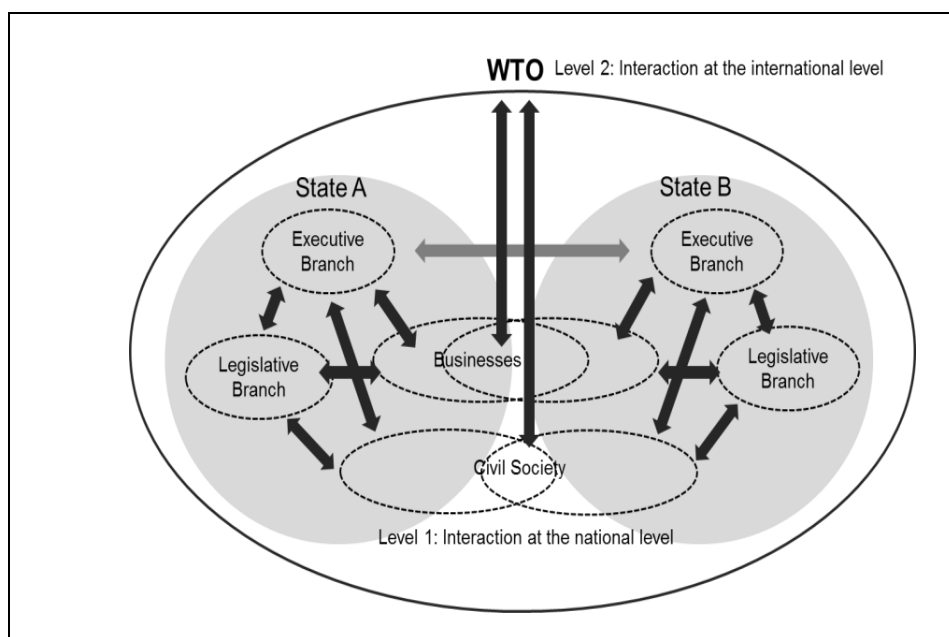
²⁸ See Article IV (*Structure of the WTO*) of Marrakesh Agreement Establishing the WTO in WTO (1999), The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Text.

²⁹ See Article 2 (*Administration*) of Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes in WTO (2003).

³⁰ See Article VI (*The Secretariat*) of Marrakesh Agreement Establishing the WTO in WTO (2003).

public debate.”³¹ Meanwhile, multinational corporations proliferated and their activities were not contained to just one nation and their demands and interests went beyond their national boundaries. The civil society also became international because their interests were mostly in trans-border issues such as the environment and human rights. Thus, as shown in Figure 4, interactions between the WTO and transnational NGOs became an important facet of public-private relationships at the international level.

Figure 4. Public-Private Interaction under the WTO



Source: Author's analysis

Since adopting the Guidelines 1996, there had been attempts to engage non-state actors in the WTO to enhance transparency, but the failure of the Seattle Ministerial meeting in 1999 proved that the efforts were not

³¹ Decision by the General Council, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations', WT/L/162, 23 July 1996.

enough. After the Seattle debacle, many debates and academic studies were carried out to explain how to deal with the WTO's legitimacy crisis³², and suggestions for increasing transparency and public engagement were made. On the 10th anniversary of the WTO, the WTO Consultative Report, called the 'Sutherland Report,' was published on 17 January 2005.³³ The Report dedicated one chapter among nine to 'Transparency and Dialogue with Civil Society,' and attempted to respond to criticism of the WTO as being undemocratic and non-transparent. The Report overviewed what the WTO had done to enhance both external and internal transparency and in the last part, suggested a framework for establishing relations with civil society. It emphasized the importance of reviewing the WTO's relationships with NGOs as well as with the public, but also clarified again that it was the Member states who had the primary responsibility for engaging civil society in trade policy matters. Most importantly, the Report suggested that the Member states should develop clear objectives for the WTO Secretariat's relations with civil society and the public at large.³⁴

³² For more discussion on the 'legitimacy deficit' of the WTO, see Daniel C. Esty (2002), 'The World Trade Organization's Legitimacy Crisis', *World Trade Review* 1(1): 7-22, Manfred Elsig (2007), 'The World Trade Organization's Legitimacy Crisis: What Does the Best Look Like', *Journal of World Trade* 41(1): 75-98, and Sungjoon Cho (2005), 'A quest for WTO's Legitimacy', *World Trade Review* 4(3): 391-399.

³³ WTO Consultative Report (2005), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. This report was written by Peter Sutherland, Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, and Thierry de Montbrial.

³⁴ *Ibid.*, p.47.

2.1.3 Goals of Public-Private Relationships in Trade Policy-making

Upon the background of change in public-private relationships in trade policy-making, it is necessary to discuss the goals of such relationships. The following objectives describe what public-private relationships must ultimately achieve.

2.1.3.1 Legitimacy and Transparency

After World War II, a number of international organizations were established and dominated by a small number of developed countries. Under this club-like governance, government officials from member states negotiated in secret and reported the results to their legislative bodies and publics. As mentioned above, Keohane and Nye have stated that a lack of transparency to functional outsiders under the club model was a key to political efficacy.³⁵ However, the club model became gradually challenged and most intergovernmental organizations including the WTO have been criticized for their ‘legitimacy deficit’ or ‘democratic deficit’. Many scholars have suggested diverse definitions regarding the concept of legitimacy,³⁶ but they seem to have in common that the issue of legitimacy is closely related to opening the doors to

³⁵ Keohane and Nye, p.5.

³⁶ Regarding the definitions of legitimacy, Cho has explained both narrow and broad definitions. A narrow definition is formal procedures such as ratification and a broad one is societal acceptability of the polity or institution. Refer to Cho (2005). Nanz and Steffek (2004) have also reviewed different approaches to democratic legitimacy of international governance and explained that legitimacy can be understood as a general compliance of the people with decisions of a political order that goes beyond coercion or the contingent representation of interests.

the public and the input of stakeholders both at the national and international levels. Thus, one of the primary objectives of public-private relationships in trade policy-making is to enhance legitimacy by improving transparency in the trade policy-making process both at the national and international levels.

Unlike nation-states, intergovernmental organizations do not have their own constituencies and often lack the democratic legitimacy that comes from having transparent procedures, institutional arrangements, and activities conducted by politicians seeking re-election by appealing to the public. This is why international organizations emphasize that each member government has the first responsibility to engage private actors in the policy-making process. Nevertheless, as the scope and capacity of international institutions including the WTO have increased and they began setting rules which affect not only the business environment but also the fundamental welfare of citizens, their democratic legitimacy has been continuously questioned.³⁷ Cho has explained in this regard that “the widening of the observer or stakeholder circle shifted the dimension of the WTO’s legitimacy to a broader concept of societal acceptability of institution.”³⁸ Esty has also pointed out that under the club-model trade regime, “the WTO’s legitimacy had derived entirely from its perceived efficacy and value without any elected officials accountable to a defined public, but its efficacy-based claim to legitimacy was eroded because public perceptions about trade and trade policy making have changed.”³⁹

When it comes to the deficit of democratic legitimacy in trade policy-making, it is a matter that not only applies to the international trade regime, but also to national governments. Even if a small group of trade

³⁷ Nanz and Steffek (2004), p.314.

³⁸ Cho (2005), pp.392-393.

³⁹ Daniel C. Esty (2002), ‘The World Trade Organization’s Legitimacy Crisis’, *Faculty Scholarship Series*, Paper 433, p.10.

officials are appointed by legitimately elected national governments, they no longer appropriately represent the diverse interests of their constituents. As trade issues become a major focus of public attention, the more important it becomes for affected parties to feel that not only their voices but their views are taken seriously in the course of policy-making.⁴⁰

After all, the issue of legitimacy deficit in trade policy-making at the international and national levels can be tackled by establishing a more transparent public engagement mechanism. Bonzon has, in this regard, noted that “the goal of improving the democratic legitimacy of WTO decision-making is most often put forward by proponents of formalized public participation in the WTO.”⁴¹

While public-private relationships aim to enhance legitimacy of trade policy-making both at the international and national levels, the issue of legitimacy of private actors should also be addressed. As more NGOs are becoming domestically and internationally involved in policy-making, questions regarding their representativeness, accountability, and overall legitimacy have been raised.⁴² In addition to NGOs, business and civil society actors should also be responsible and clear about what they claim and conduct when they are engaged in policy-making processes. Therefore, in order for them to be more legitimate at the national and international levels, procedures or principles which provide private actors with a legal or consultative status must be developed.

⁴⁰ *Ibid.*

⁴¹ Bonzon (2014), p.236.

⁴² For further discussion on the legitimacy of NGOs, see Anton Vedder ed. (2007), *NGO Involvement in International Governance and Policy: Sources of Legitimacy*, Boston: Martinus Nijhoff Publishers.

2.1.3.2 Maximization of Social Welfare

The main concern of most literature on public engagement or public-private relationships in trade policy-making has been the legitimacy issue of decision-making processes at the domestic and international levels and at the WTO itself. However, the goals of public-private relationships in trade policy-making are not limited to enhancing legitimacy from a legalistic and institutional point of view. The more substantial goal is to maximize social welfare and defend the economic interests of stakeholders.

As recognized in the preamble of the GATT, “raising standards of living, ensuring full employment and a large and steadily growing volume of real income” was the primary objective and it was believed that this could be achieved by opening markets worldwide. However, it seems now that ‘social welfare’ does not necessarily always equate to the objectives that the GATT has sought. As the scope of trade issues has been enlarged from purely tariffs to more socioeconomic issues of environmental and labor standards, trade policy came to affect a wider spectrum of economy and society. In this regard, Esty explained that “a failure to take account within the trade regime of the possibility of transboundary pollution spillovers would render the international economic system open to market failures resulting in diminished allocative efficiency, reduced gains from trade, and lost social welfare.”⁴³ Likewise, the ultimate objective of modern trade policy which encompasses a variety of economic and social issues is to maximize social welfare as a whole, not only economic prosperity. Efforts to engage and

⁴³ Esty (2002), p.14.

reflect the voices of more diverse interested parties in the trade policy-making process can contribute to achieving this goal.

2.1.3.3 Minimization of Social Conflict and Agency Costs

Trade liberalization through multilateral or bilateral trade agreements creates losers as well as winners. Opening markets could provide more jobs and raise wages in some sectors, but also jeopardize job security and decrease economic profits in other sectors. As the trade agenda expands from the reduction of tariffs to the area of domestic regulations, people even fear that their sovereignty might be threatened as a result of trade negotiations. This is why multilateral or preferential trade negotiations are often accompanied by protests or serious conflict between government and interested parties. No one can deny the fact that the results of trade negotiations cannot satisfy all the needs of stakeholders whose interests are diverse and sometimes conflict with each other. However, attempts by governments to give them more chances to make their voices heard and their views presented and exchanged before and during the process of decision-making can contribute to minimizing social conflict.

There is another aspect of conflicting interests between governments and private parties. This can be explained in the context of a principal-agent relationship.⁴⁴ In trade negotiations, the agents are government officials who

⁴⁴ For more explanation on the principal-agent problem, see Hillie Aaldering, Lindred L. Greer, Gerben A. Van Kleef, and Carsten K.W. De Dreu (2012), 'Interest (mis)alignments in representative negotiations: Do pro-social agents fuel or reduce inter-group conflict?' *Organizational Behavior and Human Decision Processes* 120: 240-250, pp.240-241. The Principal-agent problem refers to the situation in which the agent or representative has, or may have, interests misaligned with those of the principal or constituency he or she is supposed to

negotiate with another government and the principals are private parties. Since trade negotiations take place in secret, there can be severe information asymmetries between the principals and agents. Moreover, there can be differences in interests between the government officials and interested parties which would lead them to pursue different goals and strategies. As a result, the agent may negotiate in a way which does not meet the interests and goals of the principal. This can be referred to as 'agency costs'.⁴⁵ Howse has suggested that transparency and inclusiveness with regard to non-state actors would help reduce agency costs.

2.1.3.4 Optimal Distribution of Resources

As a result of trade policy and international trade agreements, there are almost always distributional winners and losers. As mentioned above, potential losers often tend to vehemently oppose trade agreements, which sometimes causes serious social conflict. In addition, interested parties who are likely to be adversely affected by a certain trade policy have the incentive to organize and press for their policy preferences and become 'veto players'. These veto players influence the ratification of international trade agreements by imposing the transaction costs of the agreements on the executive body at the

serve. This misalignment of interests creates a problem for the principal or constituency who delegates its decision control to an agent that may be more or less trustworthy.

⁴⁵ Robert Howse, 'How to begin to Think about the "Democratic Deficit" at the WTO', in Stefan Griller ed. (2003), *International Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, Vienna and New York: Springer. To discuss democratic deficit of the WTO, Howse suggested a model of representative democracy and explained that representative democracy is fundamentally constituted by a principal-agent relationship, that of the people to their representative.

ratification stage.⁴⁶ As the number of veto players increases and their linkage with political parties or politicians becomes stronger, the government is more pressured to offer compensatory packages to the veto players to change their ratification vote. This compensation is the most direct measure of the transaction costs incurred by a government to secure the ratification of an agreement.⁴⁷ It is often the case that veto players will delay, derail, or even block the ratification and thus the government provides something that would change the veto players' positions toward an international trade agreement. Such effects of veto players could hamper the optimal distribution of resources because the government often offers excessive compensation and therefore, weakens the veto players' motivation to restructure themselves. Accordingly, engaging interested parties who are deemed as potential veto players in the process of trade policy-making is very important in order to not distort the optimal distribution of resources.

Regarding the effects of veto players on preferential trade agreements, Mansfield and Milner have illustrated the case of the Korea-Chile FTA. While the Korean government negotiated its first FTA with Chile, protests by farmers' unions spread nationwide and became violent. The FTA was finally ratified in 2004 when the government agreed to pass a legislation that provided compensation to declining industries and agriculture.⁴⁸ Veto players' demands for a compensation package further increased as Korea concluded

⁴⁶ Edward D. Mansfield and Helen V. Milner (2012), *Votes, Vetoes, and the Political Economy of International Trade Agreements*, Princeton: Princeton University Press, pp.29-63. Regarding veto player, Mansfield and Milner explains that veto players exist in all regime types even though democracies tend to have more veto players than other regimes.

⁴⁷ *Ibid.*, p. 53.

⁴⁸ *Ibid.*, p.54. The Korean government has implemented a number of policy measures to compensate industries, mostly agricultural and fishery sectors, for losses they will suffer directly as a result of FTAs. Regarding the Korea-Chile FTA, promised expenditure on the compensatory measures amounted to KRW 1.2 trillion and most of the amount was for compensating the losses of fruit producers.

FTAs with the EU, the U.S. and China.⁴⁹ Even in the case of the Korea-China FTA, in which Korea excluded almost all sensitive agricultural products from tariff concessions, the government agreed to an unprecedented assistance fund⁵⁰ to expedite the ratification of the agreement. However, despite the use of compensatory measures since Korea's first FTA with Chile in 2004, the competitiveness and efficiency of Korea's agricultural sector have not substantially improved.

⁴⁹ For more information on the compensation package, see Jin ho Myoung, Hye-sun Jung, and Hyun-jung Je (2014), 'The Decade-Long Journey of Korea's FTAs', *IIT Working Paper* 14-01. For the Korea-US FTA, the range of compensatory measures was further expanded almost twofold to provide KRW 24.1 trillion in total.

⁵⁰ In the process of ratification of Korea-China FTA, the political parties agreed with the government to establish a fund to compensate the farm and fishery sectors. According to the agreement, private firms, public enterprises and agricultural and fisheries cooperatives will 'voluntarily' donate to the fund, which is projected to reach 1 trillion won (US\$ 865 million) over 10 years. In this regard, Jaemin Lee criticized, in his editorial at the Korea Herald, that 'no country has adopted this type of scheme before-arranging to transfer money from the beneficiaries of a trade deal to affected sectors....we have to make sure that the benefit of a trade agreement is fairly distributed among domestic constituents. But having exporters and manufactures pay as they profit is a new formula that has not been tried before.' See Lee Jaemin (2015, December 1), 'Sharing Benefits of FTA – but how?' *The Korea Herald*.

2.2 Analytical Frameworks on Public-Private Relationships in Trade Policy-making

As the environment for trade policy-making has changed and demands for public engagement in policy-making processes have increased, formalization or institutionalization of public-private relationships have been made at the international and national levels. Many scholars have introduced and explained such mechanisms mostly in a descriptive way, but few attempts have been made to provide a framework through which the existing public engagement mechanism in trade policy-making can be analyzed.

Hocking has introduced three models of trade consultation and based on the model, analyzed trade policy consultations in Canada and the European Union (EU). Three basic models of trade consultation that he suggested are as follows: The first model is referred to as ‘the Club Model’ which focuses on internal bureaucratic consultation. In this model, the participants are limited to trade ministries and other sectoral ministries, and the main aim is to coordinate trade policy in response to complex trade agendas. The second model is ‘the Adaptive Club Model’ which includes business-focused consultation. In this model, the participants include business representatives who are most affected by trade policy-making and the aim of the model is to seek advice in order to close the knowledge deficit in the public sector. The third model is ‘the Multistakeholder Model’ which aims to enhance consensus in favor of free trade in the face of growing public opposition.⁵¹ Based on these models, he explained that domestic trade policy-making processes in Canada and the EU have transformed from closed systems into a

⁵¹ Hocking (2004), pp.11-14.

multistakeholder model.⁵² His approach is meaningful in that the consultation mechanism in trade policy-making is divided into three models according to the scope of participants and the aims of consultation. It is also noteworthy that he stressed the three models of consultation are affected by political and economic contexts and are not necessarily sequential. However, his analysis focuses only on the ‘consultation’ process, which is one form of public engagement.

2.2.1 Three Levels of Public Engagement in Trade Policy-making

This study attempts to provide a framework with which a variety of existing forms of public engagement mechanisms can be categorized according to the level of involvement and stage of the trade policy-making process. The idea of this approach originates from Jackson’s explanation of transparency and participation under the dimensions of dispute settlement and decision-making in a two-by-two matrix. On the subject of transparency and participation, Jackson has explained them separately: transparency as “information for the public” and “internal flow of information” and participation as “having an opportunity to be heard and present views.”⁵³ Between transparency and participation as the first and third level of public engagement, this study adds consultation as the second level of engagement, which is most widely used in literature.

⁵² *Ibid.*, pp.14-22.

⁵³ John H. Jackson (2001), ‘The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited,’ *Journal of International Economic Law* 4(1): 67-78.

To begin, it is necessary to define the three levels of public engagement in more detail since transparency, consultation, and participation are often interchangeably used in many literature and articles. The three forms of public engagement are divided, in principle, according to the level of involvement, but they are actually layered because transparency is a prerequisite for participation. Regarding the definition of the three levels of public engagement, the OECD's paper on Information, Consultation and Public Participation in Policy-making⁵⁴ can be usefully referred to because it also suggests three concepts of 'information', 'consultation', and 'active participation'. It explains that from information to consultation and active participation, the influence citizens can exert on policy-making rises.⁵⁵

2.2.1.1 Transparency

Jackson saw transparency as "information for the public" and explained that information could be made available to the public by providing documentation, opening meetings or procedures, and opening hearings for

⁵⁴ OECD (2001), *Citizens as Partners Information, Consultation and Public Participation in Policy-Making* and OECD (2001), *Citizen as Partners, OECD Handbook on Information, Consultation and Public Participation in Policy-making*, OECD Publications Service. Recognizing the importance of strengthening the relations between government and citizens, the OECD has published a paper and its handbook to offer a practical 'road map' for building robust frameworks for informing, consulting and engaging citizens during policy-making.

⁵⁵ Similar categorization for participation rights appears in Francesca Bignami (2004), 'Three Generations of Participation Rights before the European Commission', *Law and Contemporary Problems* 68(1): 61-83. The article offers a conceptual framework for analyzing the development of participation rights before the European Commission from the early 1970s. Process rights (procedural or participation rights) are divided into three categories, the right to a hearing, the right to transparency, and the right to civil society participation. Regarding transparency, Bignami has explained that "the transparency principle not only guarantees the right of individuals to demand documents but also informs government practices making documents freely available." Examining debates on the right to participation, he has mentioned that democracy and representation are the most persuasive rationales for allocating power to individual citizens and their organizations in policy-making process.

more interactive information sharing or gathering.⁵⁶ Bonzon has more broadly defined ‘transparency’ as opening an institution’s decision-making process. With regard to improving transparency of the WTO’s decision-making process, he mentioned four aspects: access to WTO documents, access to sessions of WTO bodies, the definition of a standard drafting format for WTO decisions and the supervision of key WTO actors.⁵⁷ Keohane and Nye have explained that ‘transparency’ means that “not only the formal rules, but the arguments and reasoning, that shape both decisions on trade rules, and the adjudication of those rules, will need to be public.”⁵⁸ The OECD used the term, ‘information’ as the first level of government-citizen relations, which seems to be equivalent with ‘transparency’ in this study. According to the OECD, the information level means “the government disseminates information on policy-making on its own initiative or citizens access information upon their demand.”⁵⁹ Transparency is very important in that it is a starting point for public engagement, but is the lowest level of engagement because transparency is a one-way system.

2.2.1.2 Consultation

‘Consultation’ is the most widely used term in relation to public engagement in policy-making. In the General Principles and Minimum Standards for Consultation of interested parties by the European Commission, ‘consultations’ mean “processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a

⁵⁶ *Ibid.*, p.76.

⁵⁷ Bonzon (2014), pp.244-245.

⁵⁸ Keohane and Nye (2001), p.21.

⁵⁹ OECD (2001), p.15.

decision by the Commission.”⁶⁰ Though the term ‘consultation’ is not defined, the Trade Act of 1974 in the U.S. also provides that the President “shall *consult* with representative elements of the private sector.....on the overall current trade policy of the U.S.” All formal advisory mechanisms in the U.S. can be categorized as consultations. According to the OECD, ‘consultation’ means the government asks for and receives citizens’ feedback on policy-making and for such feedback, the government defines whose views are sought on what issue during policy-making. Since the government is required to provide information to its citizens before receiving feedback, consultation is considered as ‘a limited two-way relationship’ between government and private parties.⁶¹

2.2.1.3 Participation

It is tricky to define ‘participation’ as the third level of public engagement since the term is often indiscriminately used. Jackson has mentioned that participation is a more delicate issue in the context of decision-making and defined that participation by non-state actors means that they have an opportunity to be heard and present their views.⁶² The OECD goes further and defines ‘participation’ as “citizens themselves taking a role in the exchange on policy-making, for instance by proposing policy-options” and explains that ‘participation’ is “an advanced two-way relation between government and citizens based on the principle of partnership.” Here, the OECD clarifies that even though citizens may actively participate in the decision-making, the

⁶⁰ Communication from the Commission, ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704, 11.12. 2002.

⁶¹ OECD (2001), p.16.

⁶² Jackson (2001), pp.76-77.

responsibility for policy formulation and final decision rests with the government.⁶³ The main difference between ‘consultation’ and ‘participation’ is that participation implies that decisions can be made in cooperation and with consent between government and private parties.

2.2.1.4 A Framework for Three Levels of Public Engagement in Trade Policy-making

These three levels of public engagement can be applied to all policy-making. For a framework to analyze public-private relationships in trade policy-making, there is a need to look at the levels of public engagement under two or three dimensions of trade policy-making from rule-making and ratification at the national level, to implementation. With the framework illustrated in Table 2, relationships between public and private parties in the process of trade policy-making in the international trade regime, such as the WTO, or in each state can be analyzed.

From transparency and consultation, to participation, the level of public engagement and its influence on trade policy-making increases. To reach the level of consultation and participation, transparency is a prerequisite. Since the levels of public engagement can be different in each stage of trade policy-making within a country, this framework can highlight whether the level of public engagement is coherent throughout all stages of trade policy-making.

⁶³ OECD (2001), p.16.

Table 2. A Framework for Public-Private Relationships in Trade Policy-making

	Rule-making (Negotiations)	Ratification (only Domestic Level)	Implementation (Dispute Settlement)
Transparency	Provision of access to information (documents)		
Consultation	Solicitation of input or advice from private parties		
Participation	Proposal for policy options or agenda-setting		

Source: Author's analysis

2.2.2 Three Models of Public Engagement in Trade Policy-making at the National Level

As Hocking has said, it may be dangerous to identify oversimplified models regarding public engagement in trade policy-making at the national level. However, the finding that there are levels of public engagement from transparency and consultation, to participation suggests that three models of public-private relationships in trade policy-making can be identified. The three models are summarized in Table 3.

The first model can be called the ‘Open State-centered Model’, in which a group of trade-related government officials take the lead in trade policy-making and provides access to documents and information. Even non-democratic states recognize and passively provide private parties with rights to access information for the sake of transparency, which has been emphasized at the WTO level. According to the Trade Policy Review on China reported by the Secretariat, the Provisions on the Disclosure of Government Information mandate the Chinese governments at the central and local levels to establish processes for information disclosure; formulate guides and catalogues on the information to be disclosed; and improve the publication of information and systems concerning performance review, public comments, annual reporting, and accountability.⁶⁴ In this model, private actors play a very limited role with their access to information, and do not have a mechanism through which their opinions or voices can be heard. Therefore, they often end up becoming supporters for their government’s

⁶⁴ WTO Trade Policy Review Body, *Trade Policy Review on China*, WT/TPR/S/300/Rev.1, 7 October 2014, p.36.

trade policy or veto players who can delay or even block the ratification process of international trade agreements. Under the institutionalized mechanism for establishing public-private relationships at each stage of trade policy-making, the right to access information or documents is protected even though the content of deals are kept secret during trade negotiations. The legislative body can monitor a trade agreement only when the agreement is signed and submitted for its ratification. Before the ratification process, the administrative body conducts an impact assessment of the trade agreement, which is driven by the government only under this model. When it comes to the implementation of the trade agreement, there is no institutional process for private actors to petition their government to act on trade dispute settlements.

The second model is the 'Consultation Model' in which the government attempts to engage private sectors as an adviser in the process of trade policy-making. In fact, formal or informal consultations on trade policy have already taken place in many countries. As the scope of the trade agenda expands, government officials in charge of trade policy experience a knowledge deficit and have strong incentives to seek technical information and advice from interested stakeholders. In the Consultation Model, there are formalized and institutionalized consultation mechanisms, through which private actors' information and opinions can be reflected. The most common forms of formal public consultation at the negotiation stage are public hearings and advisory or consultation bodies. At the ratification stage, the legislative body in this model does *ex-ante* monitoring on trade agreements and the government's impact assessment is conducted on a consultation basis. At the implementation stage, interested parties can only informally request and consult with the relevant authority for dispute settlements.

Table 3. Three Models of Public-Private Relationships in Trade Policy-making at the Domestic Level

		Open state-centered Model	Consultation Model	Participation Model
Roles of private actors		Supporters or Veto players	Advisors Consultants	Agenda-setters Demanders Cooperators
Government's motivations to engage private actors		Enhanced transparency & efficiency	Insufficient information & knowledge	Complement to representative democracy
Functions of public-private relationship		Information sharing (one-way)	Information gathering & seeking advice	Partnership Cooperation & Coordination,
Institutional frames for public engagement	Rule-making (Negotiations)	Right to access documents and information	Public hearings Advisory or consultation body	Direct or indirect participation
	Ratification	<i>Ex post</i> monitoring, Government-driven impact assessment	<i>Ex ante</i> monitoring, Consultative impact assessment	<i>Ex ante</i> monitoring, Participatory impact assessment
	Implementation (Dispute settlement)	Lack of institutionalized process	Informal request & policy decision	Right to petition government act on trade dispute settlement

Source: Author's analysis

The third model is the 'Participation Model' in which private parties are proactively engaged in trade policy-making. In this model, the government provides the most advanced and strongest mechanism to strengthen public-private relationships. Interested parties can directly or indirectly participate in setting the policy agenda and even propose policy options or cooperate in

policy-making and implementation. In other words, private parties can play an active role in trade policy-making as an agenda-setter, a demander, or a cooperator. Even if governments allow private parties' participation in policy-making, it does not mean the governments' rights and duties to make policy decisions are reduced. Rather, the provision of participation for private actors can complement representative democracy which rests on the consent of constituents in the form of elections. Therefore, the functions of public participation are different from those of public consultations in that government and interested parties can cooperate and establish a good partnership through active participation in policy-making. As more private actors are engaged in trade policy-making, communicating and coordinating diverse interests through their active participation also become important. In the Participation Model, private parties have an opportunity to participate directly or indirectly in trade negotiations even though they cannot represent their country. There is a good example of interested parties' participation in trade negotiations in Mexico, which is called the "operation of the room next door." During the negotiations for the North American Free Trade Agreement (NAFTA), private parties unified under the Coordinating Body of Foreign Trade Business Associations (COECE) were actively involved in the talks. During the negotiations, the advisory members of COECE would be allowed to use a room close to the negotiations and make contact with the Mexican negotiators when necessary. It is considered that COECE played a meaningful role as a technical adviser during the negotiations. This 'room next door' presentation at the site of negotiations can be one form of indirect participation of interested parties in trade negotiations.⁶⁵ At the ratification

⁶⁵ Carlos Alba V. and Gustavo Vega C., 'Trade Advisory Mechanism in Mexico', in INTAL-

stage, the legislative body in the Participation Model is more informed of the results of the trade agreement due to the *ex-ante* monitoring of the agreement. The American model of legislative involvement in the efforts of the executive body in concluding trade agreements and implementing trade policy can be a good example.⁶⁶ This unique American model will be discussed more in detail in Chapter 3. At the implementation stage, public participation can be realized through a legal mechanism which provides interested parties with the right to petition their government to act on trade dispute settlements. Such mechanism can facilitate collaboration and cooperation between interested parties and government in challenging foreign trade barriers and bringing forth complaints to the DSB in the WTO.

The framework of the three models in Table 3 does not necessarily imply that one country is categorized only under one model or that the three models are evolutionary and thus, the participation model is the final level of public-private relationships. Rather, the framework could be used for a variety

ITD-STA (2002), *The Trade Policy-Making Process Level One of the Two Level Game: Country Studies in the Western Hemisphere*, pp.55-65. Before the NAFTA negotiations, COECE had a small staff assigned by the private sector organizations related with trade. However, when the private sector decided to participate in the negotiations, COECE became an organization comprising all business organizations involved in trade. COECE undertook studies of all economic sectors in Mexico in order to identify their strengths and weaknesses and prepare their positions in the negotiations. In order to prepare the sectoral studies, 140 working groups were established within COECE. COECE has proceeded to present the initial working group positions to the Mexican government and discuss them. COECE and the Mexican government has declared that there were more than 400 meetings between them before the initiation of the NAFTA negotiations. COECE claims to have organized more than 355 seminars and workshops on a nation-wide basis, intended to explain the objectives, potential benefits and challenges of the agreement to business representatives.

⁶⁶ With regard to the American model of legislative involvement, see James Bacchus (2004), 'A Few Thoughts on Legitimacy, Democracy, and the WTO', *Journal of International Economic Law* 7(3): 667-673. Discussing legitimacy and democracy in the WTO, Bacchus argued that the principal focus of efforts to improve the legitimacy of the WTO-based trading system by increasing the 'democracy' in international trade policy making should be on ensuring more democratic governance of national trade policymaking through more effective democratic governance of democratic governance within the national governments of the individual Member states of the WTO.

of purposes. It can be applied to identify the relations between economic development or democratization and the level of public engagement by categorizing countries at different stages of economic development or democratization into the three models. There have recently been many case studies on public-private relationships in trade policy-making at the national level, but there were no tools to make comparisons among countries. In this regard, dividing up the case studies into the three models and comparing them can provide meaningful implications for the study of public-private relationships at the national level. The relationship between economic development or democratization and the changing level of public engagement in a country can also be analyzed based on the framework. Even within one country, the level of public engagement in trade policy-making may be changing or evolving according to its industrial development, trade liberalization or political democratization.

The application of the three model approach is not limited to country-level analysis. The levels of public engagement can vary depending on the agenda of trade policy. As trade agendas require more technical information and knowledge, there are more incentives to engage and consult relevant private parties. In addition, in the field of social regulations such as environmental and labor standards, which involve not only businesses but also civil society, there can be more demands for public engagement. In reality, the mechanism for engaging private parties in labor and environmental issues has already been provided in the context of free trade agreements. The Civil Society Dialogue Mechanism established under the Korea-EU FTA is a good

example.⁶⁷ Opportunities for public participation are also prescribed in the labor and environment chapters of U.S.-led free trade agreements.⁶⁸ Likewise, according to the nature of the trade agenda, the level of public engagement can be different and thus the three model approach can be applied to identify the spectrum of a given trade agenda.

⁶⁷ See the Official Text of the Korea-EU Free Trade Agreement, Chapter 13 (Trade and Sustainable Development). Paragraph 4 of Article 13.12 (Institutional Mechanism) provides that “Each Party shall establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of this Chapter.” The Group(s) comprise(s) independent representative organizations of civil society in a balanced representation of environment, labour and business organizations as well as other relevant stakeholders.

⁶⁸ See the official text of the Korea-US FTA, Chapter 19 and 20. Article 20.7 (Opportunities for Public Participation) prescribes that “each Party shall convene a new, or consult an existing, national advisory committee, comprising persons of the Party with relevant experience, which may include experience in business or environmental matters, to solicit its views on matters related to the implementation of this Chapter.”

Appendix: Theoretical Underpinning

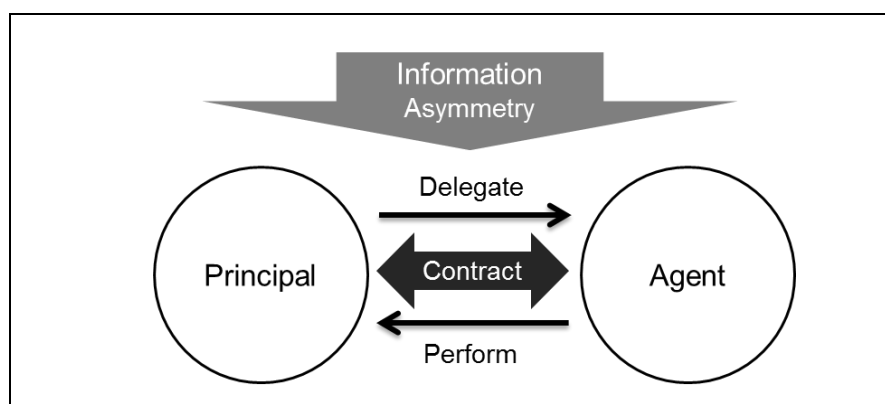
As briefly mentioned in the introduction, public-private relationships in trade policy-making can also be examined from the principal-agent perspective. Even though the principal-agent theory was originally developed from the economic analysis of insurance, it has also been applied in various fields including political science and international relations. In dealing with the legitimacy issue of the WTO, Howse also linked the problem of democratic deficit with agency costs.⁶⁹ According to his explanation, the perceptions and preferences held by bureaucrats, who are involved in international trade negotiations, and by their principals, who are private actors, can be different. These differences between agents and principals may cause agency costs, which also results from the informational advantage of agents according to the principal-agency theory.

Even though public-private relationships in trade policy-making can be intuitively described from the principal-agent perspective, it is difficult to apply these relationships to the basic principal-agent framework as shown in Figure A1. This is why only a few attempts have been made to apply the principal-agent theory to analyze the direct relationship between public and private actors in trade policy-making. On the other hand, there have been many studies on the delegation of trade policy to executive agents by legislators. This application of the principal-agent theory started from the analyses of U.S. congressional politics, where regulatory bureaucrats are

⁶⁹ Howse (2003), pp.4-5.

agents and U.S. Congress is the principal.⁷⁰ These analyses of legislators and bureaucrats from the principal-agent perspective have focused on legislators' oversight and control over administrative agents. Among the abundant literature on this subject, McCubbins and Schwartz introduced two forms of congressional oversight: the police-patrol oversight, which is a comparatively centralized, active and direct technique, and the fire-alarm oversight, which enables individual citizens and organized interest groups to examine administrative decisions.⁷¹ These two forms of congressional oversight have often been cited in subsequent studies.⁷²

Figure A1. Principal-Agent Model



Source: Author's summary

More recently, the principal-agent model was adopted to analyze EU policies and international organizations. Bievre and Dür explained that

⁷⁰ For more detailed information on the evolution of the principal-agent application, see Gary J. Miller (2005), 'The Political Evolution of Principal-Agent Models', *Annual Review of Political Science* 8: 203-225.

⁷¹ Mathew D. McCubbins and Thomas Schwartz (1984), 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', *American Journal of Political Science* 28(1): 165-179.

⁷² These concepts were revisited in Arthur Lupia and Mathew D. McCubbins (1994), 'Learning from Oversight: Fire Alarms and Police Patrols Reconstructed', *Journal of Law, Economics and Organization* 10(1): 96-125.

legislators delegate trade authority to bureaucratic agents because they are confronted with heterogeneous demands and interests of their constituents, which largely consist of two types of lobbying groups: import-competing groups demanding protection, and exporters supporting market liberalization. They concluded that legislators maintain control of their agents in the forms of *ex ante* and/or *ex post* control mechanisms and their control increases as the scope of delegation widens. Their argument is based on an empirical study of delegation and control mechanisms in American and European trade policy.⁷³ Dür and Elsig have highlighted and analyzed the EU's complicated delegation relationships in foreign economic policy with the principal-agent framework.⁷⁴ From a more general standpoint, Hawkins, Lake, Nielson and Tierney examined international organizations in their roles as agents responsible to member states and emphasized the importance of international organizations "as actors that implement policy decisions and pursue their own interests strategically."⁷⁵ There have also been several analytical studies on principal-agent relationships in trade policy-making, but private actors or constituents were rarely considered as principals. Private actors were rather often referred to as interest groups that monitor and oversee administrative agents and forward information to legislators, thus reducing the information asymmetry between legislators and bureaucrats.⁷⁶

⁷³ Dirk De Bievre and Andreas Dür (2005), 'Constituency Interests and Delegation in European and American Trade Policy', *Comparative Political Studies* 38(10).

⁷⁴ Andreas Dür and Manfred Elsig (2011), 'Principals, agents, and the European Union's Foreign Economic Policies', *Journal of European Public Policy* 18(3): 323-338.

⁷⁵ Darren G. Hawkins, David A. Lake, Daniel L. Nielson and Michael J. Tierney ed. (2006), *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press. For discussion on the principal-agency perspective on the WTO, see Manfred Elsig (2010), 'Principal-agent Theory and the World Trade Organization: Complex Agency and 'Missing Delegation'', *European Journal of International Relations* 17(3): 495-517.

⁷⁶ For more discussion on the role of interest group to provide information to politicians about regulatory performance by agents, see Jeffrey S. Banks and Barry R. Weingast (1992), 'The

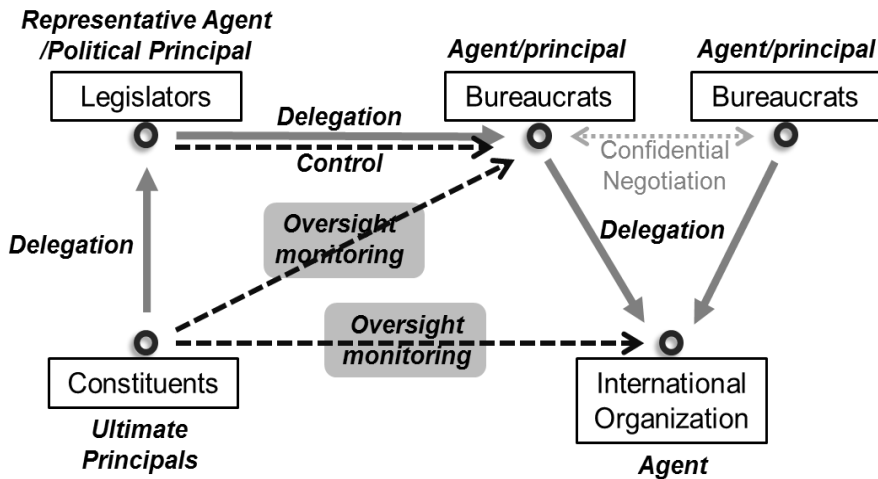
Unlike regulatory policies, trade policy-making, which involves international trade negotiations, entails multi-dimensional delegations as illustrated in Figure A2. The initial delegation occurs from constituents to legislators, and then from legislators to bureaucrats. The final chain of delegation connects bureaucrats, who are the sole representatives of member states, to international organizations including the WTO. This is the basic conceptualization of relevant actors in the context of principal-agent relationships. The delegation chains of unique political systems such as the EU, which comprises of 28 member countries, can be even more complex.⁷⁷

Up until now, the big picture of multi-faceted principal-agent relationships in trade policy-making has not been sufficiently explored. Previous studies have examined only a part or a single chain of delegation, and did not pay much attention to constituents, which are the ultimate principals. This study aims to highlight private actors as the ultimate principals, and their direct relationship with bureaucrats at the domestic level and the WTO at the international level. Although the analytical framework that this thesis introduces is not based on the principal-agent theory, the principal-agent perspective may be incorporated into the framework in future studies.

Political Control of Bureaucracies under Asymmetric Information', *American Journal of Political Science* 36(2): 509-524. It is noteworthy that Banks and Weingast focused on the role of constituents and set a model of interest group influence on regulatory agency performance. Also see Andrew B. Whitford (2008), 'A Test of the Political Control of Bureaucracies under Asymmetric Information', *Rationality and Society* 20(4): 445-470.

⁷⁷ Dür and Elsig (2011), pp.331-332.

Figure A2. Principal-Agent Relationships in Trade Policy-making



Source: Author's analysis

As a key suggestion for further research, this thesis notes that there are differences between trade policy-making and other regulatory policy-making. As the scope of trade expands, some ultimate principals will have more information and knowledge than bureaucrats. Nevertheless, executive agents have an informational advantage largely because the process of trade negotiations is kept secret. Unlike other regulatory policy-making processes, an ironic situation thus occurs where trade agents need information and the expertise of ultimate principals while they continue to keep the content of negotiations confidential. Therefore, while the role of constituents have been limited to 'oversight' or 'monitoring' in previous studies, the ultimate principals' consultative and cooperative relations with bureaucratic agents should be considered in future frameworks.

Chapter 3

Public-Private Relationships in Trade Policy-making at the International Level

There have been relatively many discussions and academic studies on public participation in the multilateral trade regime. Compared to the International Monetary Fund (IMF) and the World Bank, the GATT, the WTO's predecessor, was not legally an international organization and therefore, did not have any effective tools to engage non-state actors even if it was pressured to do so. This is why issues of transparency and public participation began to be highlighted with the establishment of the WTO.

3.1 The Legal Basis for Public-Private Relationships in the WTO

In the text of the Marrakesh Agreement establishing the World Trade Organization, Article V:2 of the Agreement provides:

The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations with matters related to those of the WTO.⁷⁸

Bossche has interpreted that the text provides an explicit legal basis for NGO involvement in the WTO and has also explained that the GATT did not

⁷⁸ WTO (1999), *The Results of the Uruguay Round of Multilateral Trade Negotiations*, the Legal Text, Cambridge University Press.

have any provisions on cooperation with NGOs. He has also emphasized that the World Bank and the IMF do not have equivalent legal provisions.⁷⁹ This legal basis of the WTO's engagement with NGOs has been more clarified when the General Council adopted in 1996 the 'Guidelines for Arrangements on Relations with Non-Governmental Organizations.' The Guidelines provide:

I. Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO".

II. In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.

III. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents.

IV. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on

⁷⁹ Peter Van den Bossche (2008), 'NGO involvement in the WTO: A comparative perspective', *Journal of International Economic Law*, 11(4): 717-749. He has also explained that the 1948 Havana Charter on the International Trade Organization (ITO) contained a provision with wording similar to Article V:2 of the WTO Agreement.

an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.

V. If chairpersons of WTO councils and committees participate in discussions or meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise.

VI. Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.⁸⁰

In the Guidelines, more prompt derestriction of documents through online networks was agreed upon,⁸¹ as well as the development of various means for the Secretariat's interaction with NGOs such as *inter alia* the organization on an *ad hoc* basis of symposia on specific WTO-related issues. Participation of chairpersons of WTO councils and committees in discussions or meetings with NGOs was also included.⁸²

⁸⁰ Decision by the General Council, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations', WT/L/162, 23 July 1996.

⁸¹ The WTO web site was launched in September 1995.

⁸² Decision by the General Council (1996), paras III, IV, V.

3.2 Enhancing Transparency in the WTO

Transparency is a starting point and also a stepping stone for further public engagement. The WTO Glossary defines transparency as ‘the degree to which trade policies and practices, and the process by which they are established, are open and predictable’.⁸³ Here, it is noteworthy that the WTO has two types of transparency; internal and external transparency. Internal transparency refers to the practices of transparency between the WTO Members, while external transparency means the practices of informing non-state actors including businesses, NGOs, and civil society of the WTO’s activities including negotiations.⁸⁴ Both types of transparency are important for the accountability and legitimacy of the WTO, however this study will focus on external transparency which is equivalent to public-private relationships in trade policy-making.⁸⁵

3.2.1 Information Availability

3.2.1.1 Access to WTO Documents and Information

The first attempt with regard to information availability was to enhance the accessibility of WTO documents to NGOs. In compliance with the 1996

⁸³ Mark Halle and Robert Wolfe (2010), ‘A New Approach to Transparency and Accountability in the WTO’, *Entwined*, Issue Brief 06.

⁸⁴ Perez-Esteve (2012), p.4.

⁸⁵ For discussion on the practices of internal transparency in the WTO, refer to Perez-Esteve (2012). In terms of internal transparency within the WTO, Perez-Esteve explains that Members have to inform the WTO and other Members of specific measures, policies or laws through domestic publication obligations and regular notifications to the WTO. The WTO also conducts regular reviews of individual countries’ trade policies through the trade policy reviews and the transparency mechanism for all regional trade agreements.

Guidelines, the General Council adopted a decision on procedures for the circulation and derestriction of WTO documents in July 1996. The decision provided that most WTO documents would be circulated as unrestricted, but there was an exception for certain documents such as working documents, minutes of meetings of WTO bodies, reports by the Secretariat and governments concerned, and reports of panels. Such reports were circulated as restricted documents first and made public more than six months after circulation.⁸⁶ In 2002, the General Council adopted another decision on procedures for the circulation and derestriction of WTO documents for greater transparency. This decision accelerated the derestriction of all official WTO documents and most documents were made available to the public approximately 45 to 90 days after circulation.⁸⁷ Therefore, almost all documents are now available for view online at the WTO website in all three official WTO languages (English, French and Spanish).

The WTO website which was launched in September 1995 plays a significant role in making not only official documents but also its information publicly available. According to the WTO Annual Report 2015, the WTO website regularly attracts over 1.9 million visits a month, and audio files of WTO meetings and events are listened to on average 39,000 times per month. Its email alert service is also provided to over 113,000 people and social media sites such as Facebook, Twitter, and You Tube are extensively used to disseminate information about the WTO.⁸⁸

⁸⁶ Decision by the General Council, 'Procedures for the circulation and derestriction of WTO documents', WT/L/162/Rev.1, 18 July 1996.

⁸⁷ Decision by the General Council, 'Procedures for the circulation and derestriction of WTO documents', WT/L/452, 16 May 2002.

⁸⁸ WTO (2015), WTO Annual Report 2015, Geneva: WTO, p.137. The largest categories for email alerts are university students (30 per cent), the business community (13 per cent), government officials (12 per cent), the academic community (12 per cent) and lawyers (8 per

3.2.1.2 NGO Briefings

Another way of engaging non-state actors in terms of transparency is to organize briefings for NGOs on the work undertaken in different WTO committees and working groups. This was first initiated through an announcement by the then WTO Director-General Renato Ruggiero calling for a series of arrangements to supplement the WTO's practices for transparency and engagement with NGOs in 1998.⁸⁹ The inaugural briefing by the WTO Secretariat for NGOs was held on 28 September 1998.⁹⁰ Since then, the practice of holding issue-specific and general briefings for NGOs has been institutionalized. Following every General Council and Trade Negotiations Committee Meeting (TNC), the WTO Secretariat holds briefings for NGOs and provides them with statements made by the Chairman of the Trade Negotiations Committee and other relevant information.⁹¹ In 2014, the WTO Secretariat held ten NGO briefings, and a total of nearly 230 NGO briefings have been organized from 2000 to 2014.⁹² It is considered that the briefings by the Secretariat are a more active way of informing NGOs than making documents and information available on its website. NGOs are briefed by the Secretariat, which provides them with statements made by the

cent). The countries with the largest total number of registration are India (9 per cent), the United States (8 per cent), Mexico (5 per cent), China (4 per cent) and France (4 per cent).

⁸⁹ Perez-Esteve (2012), p.14.

⁹⁰ Marceau and Pedersen (1999), p.20. Marceau and Pedersen have also explained some considerations to commence briefings then. First, briefings were only given to the media and NGOs were unable to attend such briefings without press credentials. Second, there was no logic to delay providing information for others because press briefings made the information public. Third, it was more efficient to brief NGOs at the same time, not individually. Fourth, timely information was becoming increasingly important to NGOs as well.

⁹¹ Perez-Esteve (2012), p.16.

⁹² WTO Annual Report 2015, p.128.

Chairman of the TNC and other information. The statements by the Chairman of the TNC are also open to the public on the WTO website.⁹³

The WTO has recently granted accreditation to Geneva-based NGOs to access the WTO for meetings and relevant workshops.⁹⁴ A total of 52 local NGO representatives are currently accredited by the WTO and they receive regular briefings on WTO issues. NGO accreditation badges are valid for one year and allow NGOs to access the WTO building for specific events or meetings without the need for registration.

3.2.2 Opening of WTO Meetings and Proceedings

3.2.2.1 Opening of Plenary Meetings of Ministerial Conferences

Responding to widespread criticism that WTO processes are undemocratic and non-transparent, the WTO has made attempts to engage NGOs in compliance with the 1996 Guidelines. First, the doors to the plenary meetings of the Ministerial Conference of the WTO were opened to NGOs in 1996, when the General Council decided to invite NGOs to attend. Initially, Members raised their concerns that NGO presence at the Singapore Ministerial meeting would set a precedent for future WTO meetings. It was finally decided that NGO attendance at the 1996 Ministerial Conference would not set a precedent for future conferences.⁹⁵ Another concern regarding the status of NGOs was raised over whether NGOs would be

⁹³ Prerez-Esteve (2012), p.16.

⁹⁴ *Ibid.*, p.17.

⁹⁵ Marceau and Pedersen (1999), pp.13-14.

allowed to ‘*observe*’ or simply ‘*attend*’ the Ministerial meetings. In the end, the NGOs that attended the Ministerial Conference were not granted an observer status.

Of the 159 NGOs that requested to attend the Ministerial Conference, 108 NGOs attended the first session of the Ministerial Conference in Singapore and this number increased until the Hong Kong Ministerial Conference in 2005 as shown in Table 4.⁹⁶ At the Bali Ministerial Conference in 2003, some 350 non-governmental organizations from 66 countries were accredited for the Conference,⁹⁷ making a total of 694 participants.⁹⁸ At the recent Nairobi Ministerial Conference in 2005, 232 NGOs from 49 countries were accredited. After the Hong Kong Ministerial Conference, the number of accredited NGOs decreased. Nevertheless, a separate section for ‘Civil Society at the Ministerial Conference’ was made on the website and information on NGO Centers, a list of accredited NGOs, and NGO position papers are currently available online.⁹⁹

⁹⁶ Bossche (2008), p.727.

⁹⁷ For NGOs to be accredited, they should take the accreditation procedure as provided by the WTO. Refer to a recent information on the accreditation procedure to the 10th Ministerial Conference of the WTO at

https://www.wto.org/english/thewto_e/minist_e/mc10_e/ngoaccmc10_e.pdf.

⁹⁸ For more information, see https://www.wto.org/english/thewto_e/minist_e/mc9_e/ngo_e.htm.

⁹⁹ See https://www.wto.org/english/thewto_e/minist_e/mc9_e/ngo_e.htm for the Bali Ministerial Conference and https://www.wto.org/english/thewto_e/minist_e/mc10_e/ngo_e.htm for the Nairobi Ministerial Conference.

Table 4: NGO Representation at Sessions of Ministerial Conferences

Ministerial Conference	Number of accredited NGOs	NGOs attended
1st Singapore 1996	159	108
2nd Geneva 1998	153	128
3rd Seattle 1999	776	686
4th Doha 2001	651	370
5th Cancun 2003	961	795
6th Hong Kong 2005	1,065	811
7th Geneva 2009	435	n/a
8th Geneva 2011	239	n/a
9th Bali 2013	350	694
10th Nairobi 2015	232	n/a

Source: Bossche (2008), WTO website, and WTO Annual Report

It was also decided to provide an NGO Center with meeting rooms and other facilities at the Singapore Ministerial Conference. Now, participating NGOs can access all public areas at the Conference and a special space reserved for them during the official opening, plenary and closing sessions. The NGO Center is set up adjacent to the premises of the Ministerial Conference to allow all NGO representatives to follow the proceedings.¹⁰⁰

The attendance of NGOs at the Ministerial Conferences has been well established, but there are yet no rules for accreditation requirements for NGOs. In 1996, the WTO Secretariat accredited all non-profit NGOs that could point to activities related to those of the WTO. At that time, any ‘non-profit’ organization which could point to “activities related to those of the WTO” was considered. The criteria for ‘non-profit’ organizations have, however, been applied on a practice basis, not a rule basis. Without a systemic

¹⁰⁰ WTO (2010), WTO Annual Report 2010, Geneva: WTO, p.120.

procedure for selection and accreditation of NGOs, the WTO submits an *ad hoc* registration for each Ministerial Conference, and this registration and accreditation is left to the discretion of the WTO Secretariat. The WTO Secretariat's criteria for accreditation are not known to public, but at least the list of accredited NGOs at each Ministerial Conference is available on the WTO website for NGOs.¹⁰¹

3.2.2.2 Public Opening of Dispute Settlement Proceedings

The WTO dispute settlement mechanism has been evaluated as one of the most successful functions of the WTO. Despite the stalemate of the Doha Round negotiations and ongoing skeptical views on the multilateral trade regime, the dispute settlement system of the WTO is still functioning vigorously. For the last twenty years, 501 cases have been brought to the dispute settlement body. The Appellate Body has issued 134 reports from 1995 to 2015 and panel reports have been adopted on more than 200 cases. As such, the WTO dispute settlement mechanism has been performing well, but its proceedings were closed to the public unlike the International Court of Justice (ICJ)¹⁰² and other international courts and tribunals. There were two

¹⁰¹ For further discussion on rules and procedures for the selection of NGOs, see Bossche (2008), pp.743-747. For a comparative analysis, Bossche introduces NGO accreditation of United Nation Economic and Social Council (ECOSOC). ECOSOC Resolution 1996/31 on the 'Consultative Relationship between the United Nations and Non-Governmental Organizations', specifically suggests the requirements for NGO to be accredited. He added that he is doubtful whether a formal system of accreditation is worthwhile as long as NGOs have no consultative status with the WTO. Also see Peter van den Bossche (2007), 'Regulatory Legitimacy of the Role of NGOs in Global Governance: Legal Status and Accreditation,' in Vedder ed. (2007). He examined the regulatory legitimacy of NGO involvement in the policy-making processes of international organizations including the UN, UNCTAD, UNEP, the WHO, the ILO, the IBRD, the IMF and the WTO.

¹⁰² International Court of Justice's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it

main reasons for having closed proceedings of dispute settlements. One was the fact that only WTO members are directly subjected to adjudication, which makes it different from national criminal, civil, and administrative trials. However, as Ehring has argued, the outcomes of WTO disputes affect not only governments but also common people and therefore, public dispute settlement hearings can strengthen the legitimacy and credibility of the system.¹⁰³

The other reason was related to whether the opening of hearings of panels and the AB complies with the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Regarding the panel, Article 14.1 of the DSU stipulates that panel deliberations shall be confidential and according to Appendix 3 on working procedures, the panel shall meet in closed session and the parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.¹⁰⁴ As Ehring has explained, panel deliberations were used to refer to the panel's internal process, not the hearings, and the working procedures of Appendix 3 could be modified after consulting the parties to the dispute according to Article 12.1 of the DSU.¹⁰⁵ Unlike the panel procedure, opening the proceeding of the Appellate Body seemed more difficult according to Article 17.10 of the DSU, which stipulates that the 'proceedings'

by duly authorized United Nations organs and specialized agencies. The ICJ open their hearings and a number of seats are allocated to members of the public on a first come, first served basis. There is no advance procedure for admission, and prior applications to attend the hearings cannot be considered. For more information, refer to the ICJ website: <http://www.icj-cij.org/information/index.php?p1=7&p2=3&p3=1>

¹⁰³ Lothar Ehring (2008), 'Public Access to Dispute Settlement Hearings in the World Trade Organization', *Journal of International Economic Law* 11(4): 1021-1034, pp.1023-1024.

¹⁰⁴ WTO (1999), the Legal text. Article 14 (*Confidentiality*) of the DSU stipulates as follows: 1. Panel deliberations shall be confidential. 2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made. 3. Opinions expressed in the panel report by individual panelists shall be anonymous.

¹⁰⁵ Ehring (2008), p.1021.

of the AB shall be ‘confidential’.¹⁰⁶ In this regard, the Sutherland Report also stated that opening dispute settlement proceedings is more complex because the DSU text prevents this approach in most cases and thus, an amendment of the DSU will be needed.¹⁰⁷

Despite these obstacles to open hearings of dispute settlement proceedings, there were many recommendations and arguments that oral hearings should be open to the public to enhance transparency of the dispute settlement procedure in the WTO. Shell suggested in 1996 that the “WTO should open its dispute resolution system and policymaking bodies to outside scrutiny and ultimately to formal participation by a variety of parties, including businesses and nongovernmental organizations.”¹⁰⁸ Charnovitz has also argued that boosting the transparency of the WTO dispute process will improve public confidence in the adjudications.¹⁰⁹ By the 10th anniversary of the WTO, the 2004 Sutherland Report also recommended that the first level panel hearings and Appellate Body hearings should generally be open to the public.¹¹⁰

¹⁰⁶ WTO (1999), the Legal text. Article 17 (*Appellate Review*) of the DSU provides as follows: 10. The *proceedings* of the Appellate Body shall be confidential. The reports of the Appellate Body shall be without the presence of the parties to the dispute and in light of the information provided and the statements made.

¹⁰⁷ WTO Consultative Report (2005), para 261. The Consultative Board argued that the degree of confidentiality of the dispute settlement proceedings can be seen as damaging to the WTO as an institution. The Consultative Board also emphasized that it is important that the dispute settlement system be better understood, not only by the diplomats, public officials and legislators that have to engage in it, but also by the general public who provide the constituencies that are being served by the system.

¹⁰⁸ Shell (1996), p.361.

¹⁰⁹ Charnovitz (2000), p.215.

¹¹⁰ WTO Consultative Report (2005), para 262.

Against this background, for the first time in 2005, the first decision to open oral hearings of dispute settlement panels of the WTO was made.¹¹¹ In August 2005, the two panels in the parallel disputes of *US-Continued Suspension of Obligations* and *Canada – Continued Suspension of Obligations* decided at the request of the parties (the United States, Canada, and the European Communities) that the public was allowed to observe the hearings with the parties¹¹² and a notice on the open hearing was published on the WTO website.¹¹³ The public was able to observe the hearing in a separate viewing room at the WTO Headquarters in Geneva and 400 places were provided on a first-come, first-served basis. As of July 31, 2015, panel meetings have been opened to public observation in 22 original and compliance disputes.¹¹⁴

In July 2008, the Appellate Body also allowed the first open hearing of *US-Continued Suspension of Obligations* and *Canada – Continued Suspension of Obligations*. With a successful experience of many open panel hearings, the EC, the U.S., and Canada made the same attempt when the cases reached the AB.¹¹⁵ Since the first open hearing of the AB proceedings, public observation of oral hearings were authorized in twelve appeals as illustrated in

¹¹¹ See Francis Williams, 'WTO Opens Hearing to Public', *Financial Times*, 13 September 2005. It was reported that 'for the first time in its 10-year history the World Trade Organization yesterday opened dispute proceedings to public view...'

¹¹² See Panel Report, *US and Canada – Continued suspension of obligations in the EC-Hormones Dispute*, Communication of the Chairman of the Panels, WT/DS320/8, WT/DS321/8, 2 August 2005. Through this communication, the Panels clarified that they carefully considered the existing provisions of the DSU and decided that the panel meetings to which the parties are invited to appear would be open for observation by the public through a closed-circuit TV broadcast.

¹¹³ See the notice on public hearings in the WTO webpage

at https://www.wto.org/english/tratop_e/dispu_e/public_hearing_e.htm.

¹¹⁴ See WTO (2015), Special Session of the Dispute Settlement Body, Reported by the Chairman, 6 August 2015, p.5, footnote 15.

¹¹⁵ See Appellate Body Report, *Canada – Continued suspension of obligations in the EC-Hormones Dispute*, Communication of the Chairman of the Panels, WT/DS321/AB/R, 16 October 2008.

Table 5. The hearings of twelve appeals out of more than forty on which the AB adopted its ruling from 2008 to 2015 were open to the public and the requesting parties in eleven out of twelve appeals included either the United States or the European Union. Most recently in January 2015, at the request of Canada and the United States, the AB opened the oral hearing on *US – Certain Country of Origin Labelling (Cool) Requirements - Recourse to Article 21.5 of the DSU by Canada and Mexico*¹¹⁶ and in September 2015, even the Arbitrator opened its meetings on the same case.¹¹⁷ Registration notices for open hearings are published on the WTO website and application forms are provided online.¹¹⁸

The AB, in its report on *US-Continued Suspension of Obligations* and *Canada – Continued Suspension of Obligations*, has clarified its interpretation of the controversial rule of Article 17.10 of the DSU on which even the requesting parties had different views. With regard to the scope of the term ‘proceedings’ in Article 17.10 of the DSU, the Appellate Body reconfirmed that the term ‘proceedings’ means the entire process of an appeal including the oral hearing, which is how the Appellate Body understood the term in *Canada – Aircraft*.¹¹⁹ However, it interpreted the meaning and scope

¹¹⁶ See Appellate Body Report, *United States - Certain Country of Origin Labelling (Cool) Requirements— Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012, Annex IV.

¹¹⁷ See Decisions by the Arbitrator, *United States – Certain Country of Origin Labelling (Cool) Requirements*, WT/DS383/ARB/ADD.1, WT/DS386/ARB/ADD.1, 7 December 2015, Annex A-3, 6 July 2015.

¹¹⁸ In the application form, it is clarified as follow: “The Panel reserves the right to call for a closed confidential session of any of the meetings, if necessary, in order to address issues related to any confidential information. The Panel also reserves the right to suspend the open hearings at any time, on its own initiative or at the request of either party, if there is any risk of breach of confidentiality or of disruption of the meetings. If the open hearings are suspended by the Panel for any reason, the Panel may decide to resume the meetings in a closed confidential session.”

¹¹⁹ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para.143.

of the confidentiality requirement in Article 17.10 in relation to Article 18.2 of the DSU¹²⁰ and explained that confidentiality is not absolute, but rather relative and time-bound. With this reasoning, the Appellate Body finally concluded that the public observation of oral hearings does not have an adverse impact on the integrity of its adjudicative functions.¹²¹ In the following procedural rulings, the AB has reiterated the interpretation of Article 17.10 of the DSU and in the recent ruling in *US – Certain Country of Origin Labelling (Cool) Requirements - Recourse to Article 21.5 of the DSU by Canada and Mexico*, the Appellate Body reconfirmed that open hearings do not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.¹²²

Table 5. List of Appeals with Public Observations of Oral Hearings

Dispute Number	Title	Appellants	Appellees	Year of Open Hearing
DS320	<i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i>	EC/US	US/EC	2008
DS321	<i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i>	EC/Canada	Canada/EC	

¹²⁰ WTO (1999), the Legal Text. Article 18.2 (Communications with the Panel or Appellate Body) of the DSU provides as follows: 2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

¹²¹ See Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, 16 October 2008, Annex IV.

¹²² WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012, Annex IV, para 4.

DS27	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador & the US</i>	EC EC	Ecuador US	2008
DS350	<i>United States – Continued Existence and Application of Zeroing Methodology</i>	EU US	US EU	2008
DS294	<i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i>	EU US	US EU	2009
DS322	<i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i>	US	Japan	2009
DS367	<i>Australia – Measures Affecting the Importation of Apples from New Zealand</i>	Australia New Zealand	New Zealand Australia	2010
DS316	<i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i>	EU US	US EU	2010
DS353	<i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i>	EU, US	US, EU	2011
DS384 DS386	<i>United States - Certain Country of Origin Labelling (Cool) Requirements</i>	US Canada, Mexico	US Canada, Mexico	2012
DS412	<i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector</i>	Canada	Japan, EU	2013
DS400 DS401	<i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i>	Canada Norway	EU, Canada, Norway, EU	2014
DS384 DS386	<i>United States - Certain Country of Origin Labelling (Cool) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i>	US Canada, Mexico	US Canada, Mexico	2015

Source: Illustrated by Author based on Appellate Body Reports on the cases

Likewise, opening oral hearings at the request of the parties to the dispute in WTO dispute settlement proceedings has been authorized at both

the panel and Appellate Body levels without making an amendment to the DSU. Despite concerns, passive observation by members of the public did not change the intergovernmental nature of the WTO or the government-to-government nature of dispute settlements. However, most public hearings have been requested by only a few parties including the U.S. and the EU, and thus, the need to institutionalize and formalize the process to open hearings in dispute settlement proceedings through a textual amendment to the DSU is still under discussion.

In the form of special sessions of the Dispute Settlement Body (DSB), negotiations on the revision of dispute settlement rules are underway and enhancing transparency is one of the core issues that are being discussed.¹²³ The proposal on opening panel and Appellate Body hearings to the public is reflected in the available version of the consolidated draft legal text as shown in Box 1.¹²⁴

According to the report by the Chairman, a number of Members support the idea of enhanced transparency by opening panel and Appellate Body hearings to the public, and acknowledged that such openness could contribute to greater public confidence in the dispute settlement process. However, some Members still have reservations as to whether “the proposed

¹²³ A 1994 Ministerial Decision says dispute settlement rules should be reviewed by 1 January 1999. The review started in the Dispute Settlement Body in 1997 and the deadline was extended to 31 July 1999, but no agreement was made. In November 2001, at the Doha Ministerial Conference, member governments agreed to negotiate to improve and clarify the DSU.

¹²⁴ The proposal to open panel and Appellate Body hearings to public observation has been discussed on the basis of the U.S.’s proposal (TN/DS/W/86) on the issue. The U.S. proposed that “the DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods).” The U.S. mentioned that “the DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine in light of the particular circumstances of a specific proceeding.” As options for allowing the public to observe the meetings, the U.S. suggested such examples as broadcasting meetings or special viewing facilities.

systematic opening of meetings would be beneficial or appropriate.” This concern is rooted in the desire to preserve the intergovernmental character of dispute settlement proceedings.¹²⁵ To date, panel meetings have been opened on an *ad hoc* basis, upon agreement of the parties in individual disputes. The Chairman of the Special Session on the DSB recognized that “the specific modalities of hearings open to public observation can be clarified through standardized procedures or left for the panel to define in consultation with the parties and in light of the particular circumstances of the case.”¹²⁶

Box 1. Consolidated Draft Legal Text on Opening Hearings to the Public

Article 18 of the DSU

Communication ~~with the Panel or Appellate Body~~

[Each substantive meeting with the parties of a panel, the Appellate Body, or an arbitrator, and each meeting of a panel or arbitrator with an expert, shall be open for the public to observe(g), except for any portion dealing with strictly confidential information

[submitted in accordance with the procedures referred to in paragraph 3.]]

(g) The expression "observe" does not require physical presence in the meeting.

APPENDIX 3

WORKING PROCEDURES

¹²⁵ WTO (2011), Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborio Soto to the Trade Negotiations Committee, TN/DS/25, 21 April 2011, page A-37.

¹²⁶ WTO (2011), Special Session of the Dispute Settlement Body, Report by the Chairman, TN/DS/27, 6 August 2015, para.3.20.

~~[2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.]~~

3.2.2.3 Opening Panel Hearings in Regional Trade Agreements

While the issue of opening panel and Appellate Body hearings to the public has been under discussion, some regional trade agreements have already adopted provisions which clearly prescribe open hearings for the public as illustrated in Box 2. The U.S., which has actively supported open public hearings in trade dispute settlement proceedings in the WTO, inserted rules for opening panel hearings to the public in regional trade agreements it has concluded. The Korea-EU FTA also set a rule to open the arbitration panel to the public in the Dispute Settlement Chapter and provided a detailed procedure for public hearings.

Box 2. Rules on Open Panel or Arbitration Hearings in Regional Trade Agreements

<Korea-U.S. Free Trade Agreement>

Chapter 22

Institutional Provisions and Dispute Settlement

Article 22.10: Rules of Procedure

1. By the date this Agreement enters into force, the Parties shall establish model rules

of procedure, which shall ensure:

- (a) a right to at least one hearing before the panel;
- (b) that, subject to subparagraph (f), any hearing before the panel shall be open to the public;
-
- (f) the protection of confidential information.

<Trans-Pacific Partnership Agreement>

Chapter 28

Dispute Settlement

Article 28.13: Rules of Procedure for Panels

The Rules of Procedure, established under this Agreement in accordance with Article 27.2.1(f) (Functions of the Commission), shall ensure that:

- (a) disputing Parties have the right to at least one hearing before the panel at which each may present views orally;
- (b) subject to subparagraph (f), any hearing before the panel shall be open to the public, unless the disputing Parties agree otherwise;

<Korea-EU Free Trade Agreement>

Chapter 14

Dispute Settlement

Article 14.14: Rules of Procedure

2. Any hearing of the arbitration panel shall be open to the public in accordance with Annex 14-B.

Annex 14-B

Rules of Procedure for Arbitration

Article 7: Hearings

1. The chairperson shall fix the date and time of the hearing in consultation with the

Parties and the other members of the arbitration panel, and confirm this in writing to the Parties. This information shall also be made publicly available by the Party in charge of the logistical administration of the proceedings unless the hearing is closed to the public. Unless the Parties disagree, the arbitration panel may decide not to convene a hearing.

3.3 Consultation with the Public

3.3.1 *Public Forum in the WTO*

Opening the formal plenary meetings of the Ministerial Conference, hearings of panels and the Appellate Body, and WTO documents have contributed to enhancing transparency of the WTO. They were, however, not enough to give non-state actors observer or consultative status. Therefore, other attempts were made to develop more interactive dialogue with NGOs and one of these efforts was to organize public symposia on WTO issues. The Guidelines 1996 suggested that the Secretariat should play a more active role in interacting with NGOs and develop various means to contact and receive information from NGOs. Among the various means, the organization on an *ad hoc* basis of symposia on specific WTO-related issues was mentioned.¹²⁷

Since 1996, a number of symposia have been arranged by the Secretariat for NGOs on specific issues of interest to civil society such as the relationship between trade and the environment, and trade development and facilitation as shown in Table 6. These symposia have provided, on an informal basis, the opportunity for NGOs to discuss specific issues with representatives of WTO Member countries. Although the symposia were held to facilitate communication and dialogue with NGOs, this format turned out to be ineffective. Marceau and Pedersen have pointed out that the format of the symposia was unsuccessful because of poorly focused discussion, general

¹²⁷ Decision by the General Council, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations', WT/L/162, 23 July 1996.

conclusions, and the lack of Member governments' presence.¹²⁸ Therefore, the WTO changed the format into an annual two-or-three-day event featuring a variety of separate workshops and seminars in which panelists and interested participants could discuss a broad range of WTO-related issues. The first public symposium held under this format took place in 2001 on issues confronting the world trading system, and its title was changed to the 'WTO Public Forum' in 2006.

According to the WTO, more than 9,000 representatives from NGOs, civil society, academia, business, the media, governments, parliamentarians and inter-governmental organizations have attended the Public Forum since it was first launched in 2001¹²⁹ and about 1,500 representatives regularly attend the Forum. Thus, the WTO evaluates the Public Forum as the largest annual outreach event. In principle, all the sessions of the Forum are organized by the participants and they determine the speaker and/or the panelists. The WTO Secretariat announces a call for proposals on the website several months before the Forum, and selects the best proposals and allocates the slots.¹³⁰ At the 20th anniversary of the WTO in 2015, the Public Forum had 88 sessions in total under the title of "Trade Works" and many international and national organizations such as the World Bank, International United Nations Conference on Trade and Development (UNCTAD), International Chamber of Commerce, International Generic Pharmaceutical Alliance (IGPA), World Trade Center Mumbai, and the Institute of Developing Economies – Japan

¹²⁸ Gabrielle Marceau and Peter N. Pedersen (1999), 'In the WTO Open and Transparent? A discussion of the relationship of the WTO with non-governmental organizations and civil society's claims for more transparency and public participation', *Journal of World Trade*, 33(1): 5-49.

¹²⁹ See https://www.wto.org/english/forums_e/public_forum15_e/public_forum15_e.htm.

¹³⁰ See https://www.wto.org/english/news_e/news15_e/pfor_27apr15_e.htm.

External Trade Organization (IDE-JETRO), and businesses such as the Evian Group participated in organizing the Forum.¹³¹

The WTO Public Forum has become the largest communication and dialogue channel with non-state actors on diverse trade-related issues based on an open participation concept. The role of the Forum goes beyond merely enhancing transparency of the WTO, in that meaningful discussion and the exchange of views among participants from various fields can be helpful for boosting the multilateral trade system and setting the future agenda. However, the fact that participation by diplomats and government officials from Member countries has not been active makes the role of the Public Forum less effective.¹³² According to the Annual Report in 2015, among the Public Forum participants in 2014, NGO representatives and international organizations respectively accounted for 19 percent and 13 percent of the total. Business representatives and government officials constituted 14 percent and 10 percent.¹³³

Table 6. WTO Public Forum

Year	Title	Subject	No. of participants
2001	Public Symposium	Symposium on issues confronting the world trading system	n/a
2002		The Doha Development Agenda and beyond	n/a
2003		Challenges Ahead on the Road to Cancun	n/a
2004		Multilateralism at a crossroads	n/a
2005		WTO After 10 Years: Global Problems and Multilateral Solutions	n/a
2006	Public Forum	What WTO for the XXIst Century?	n/a

¹³¹ See https://www.wto.org/english/forums_e/public_forum15_e/public_forum15_e.htm#schedule.

¹³² Bossche (2008), p.731.

¹³³ The WTO Annual Report 2015, p.127.

2007	How the WTO can help harness globalization?	Over 1,000
2008	Trading into the Future	1,334
2009	Global Problems, Global Solutions: Towards Better Global Governance	721
2010	The Forces Shaping World Trade	734
2011	Seeking answers to global trade challenges	765
2012	Is Multilateralism in Crisis?	753
2013	Expanding Trade through Innovation and the Digital Economy	917
2014	Why trade matters to everyone	1,064
2015	Trade Works	n/a

Note: Numbers do not include delegates, staff and other participants who carry a WTO badge.

Source: WTO website for the Public Forum and WTO Annual Report of relevant year

3.3.2 Dialogue with Non-state Actors in the WTO

Other than the WTO Public Forum, the 1996 Guidelines also suggested the possibility of participation by chairpersons of WTO councils and committees in discussions or meetings with NGOs. Such informal dialogue could be initiated by either the NGO or the relevant chairperson. Due to the informality of these meetings, reports on these meetings are rarely issued. Bossche has noted that the chairpersons of relevant WTO councils or committees do engage in informal meetings with NGOs and exchange information and views on ongoing negotiations. The WTO Secretariat staff from various divisions also have informal meetings with NGOs and they are organized on an *ad hoc* basis.¹³⁴

¹³⁴ Bossche (2008), p.733.

Other than such informal dialogue with NGOs at the WTO Secretariat staff level or chairperson level, the Information and External Relations Division (IERD) within the WTO is in charge of cooperating with civil society, business, trade unions, parliamentarians, and journalists, and the External Relations Section is responsible for enhancing dialogue and promoting the rules-based multilateral trading system to NGOs and other actors.¹³⁵ One of the important tasks of the Division is to receive position papers from NGOs and circulate the list of position papers to WTO Members and post them on the NGO section of the WTO website. The list of position papers submitted by NGOs since 1998 are available and the papers can be downloaded online.¹³⁶ In 2014, two position papers were received. One was submitted by the Institute for Trade, Standards and Sustainable Development on the use of voluntary standards, while the other was from the International Road Transport Union.

There have been many attempts and initiatives to enhance communication with and even consult NGOs. However, all existing meetings with NGOs are informal and there are no formal consultative meeting or dialogue channels between WTO Members and civil society. In this regard, in 2003, WTO Director-General, Dr. Supachai Panitchpakdi took a personal initiative to establish the Informal NGO Advisory Body¹³⁷ and the Informal Business Advisory Body. In the opening session of the Public Symposium in 2003, Supachai announced his initiatives to set up two informal processes to

¹³⁵ Perez-Esteve (2012), p.11.

¹³⁶ All NGO position papers are available at https://www.wto.org/english/forums_e/ngo_e/pospap_e.htm.

¹³⁷ Bossche (2008) has explained that the Informal NGO Advisory Body was made up of 10 high level representatives from NGOs and the Director-General Supachai Panitchpakdi selected those NGOs that he considered to be influential and broadly representative.

facilitate his dialogue with NGOs.¹³⁸ The purpose of these meetings was to enable the Director-General to consult these groups and discuss ideas and views. Each group met with the Director-General as personal advisors twice, once in 2003 and in 2004.¹³⁹ However, the informal bodies only existed until 2004 and Supachai's successor, Pascal Lamy decided to discontinue them and today, there are still no informal or/and formal advisory or consultative bodies within the WTO.

3.4 Public Participation in the Multilateral Trade Regime

3.4.1 'Amicus Curiae' as Participation in Dispute Settlement Procedures

Based on the distinction among transparency, consultation, and participation from the perspective of levels of public engagement, the only practice which can be regarded as 'participation' at the international level is the submission of *amicus curiae* briefs in dispute settlement procedures. Many academic literature and articles have implied that the submission of *amicus curiae* briefs is an active form of participation in the WTO dispute settlement process. Charnovitz has argued that "the WTO jurisprudence on *amicus* briefs demonstrates how NGO activism can promote a new opportunity for *formal participation* in governance."¹⁴⁰ Jackson has also mentioned '*amicus curiae*' briefs as a way to transmit information to the panels with an explanation that

¹³⁸ See the Director-General Supachai Panitchpakdi's comment on his initiatives at https://www.wto.org/english/news_e/news03_e/symp03_open_session_e.htm

¹³⁹ Perez-Esteve (2012), p.14.

¹⁴⁰ Steve Charnovitz (2000), 'Opening the WTO to Nongovernmental Interests', *Fordham International Law Journal* 24(1), p.189.

“participation is a different and more difficult question in the context of decision-making.”¹⁴¹ Umbricht has explained that “the *direct participation* of civil society in the WTO dispute settlement process has taken the form of the institution known as *amicus curiae* briefs.”¹⁴² Chazournes and Mbengue also stated that “the technique of the *amici curiae* corresponds to the desire to *participate* in the process of resolution of interstate disputes.”¹⁴³ Likewise, it seems many scholars perceive the submission of *amicus curiae* briefs by NGOs as a way of *participating* in the WTO dispute settlement process. Many WTO Member states have opposed accepting *amicus curiae* briefs and this was a very controversial issue within the WTO and among scholars in the early 2000s. In a General Council meeting for discussing the Appellate Body’s position on *amicus curiae* submissions, Canada commented that “the *amicus* briefs were not a transparency issue” and “it addressed the fundamental issue of *participation* in WTO dispute settlement proceedings, i.e., whether this participation should be limited to WTO Member governments or would non-governmental bodies also be entitled to participate.”¹⁴⁴ It also demonstrates that the issue of *amicus curiae* briefs goes beyond the level of enhancing transparency of the WTO dispute settlement system.

Amicus curiae literally means ‘friend of the Court’ in Latin and was an instrument originating in Roman law. It was incorporated into the English common law whose procedures had made third-party intervention difficult.¹⁴⁵

¹⁴¹ Jackson (2001), p.77.

¹⁴² Georg C. Umbricht (2001), ‘An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO’, *Journal of International Economic Law*, p.774.

¹⁴³ Laurence Boisson de Chazournes and Makane Moise Mbengue (2003), ‘The *Amici Curiae* and the WTO Dispute Settlement System: The Doors are open’, *The Law and Practice of International Courts and Tribunals* 2:205-248, p.205.

¹⁴⁴ Minutes of the General Council Meeting, WT/GC/M/60, 23 January 2001, para.71.

¹⁴⁵ See Dinah Shelton (1994), ‘The Participation of Nongovernmental Organizations in International Judicial Proceedings’, *The American Journal of International Law* 88:611-642,

Therefore, common law countries allow *amicus curiae* briefs and the U.S. Supreme Court has promulgated its rules on submission of *amicus curiae* briefs.¹⁴⁶ According to the definition on Merriam-Webster, *amicus curiae* means ‘one (as a professional person or organization) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question’.¹⁴⁷ Here, it is necessary to understand *amicus curiae* by comparing it with ‘intervention,’ a similar institution under civil law procedures. While an intervener becomes a third party to the procedure upon admission and thus, must bear the consequences of a ruling, an *amicus curiae* does not have standing and, therefore, does not have the rights and obligations of a party.¹⁴⁸

3.4.1.1 Evolution of *Amicus Curiae* Briefs in the WTO

Under the GATT system, unsolicited *amicus curiae* briefs were sent to the GATT Secretariat for consideration by panels, but they were not reported and it was understood that panelists did not consider them.¹⁴⁹ However, since the establishment of the WTO, *amicus curiae* briefs had begun to be submitted to several WTO panels. It is known that *amicus curiae* briefs were introduced for

p.616. Shelton analyzes the participation of nongovernmental organizations as *amici curiae* by comparing the proceedings of four permanent international courts: the International Court of Justice, the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights.

¹⁴⁶ For more detailed explanation on the evolution of *amicus curiae* briefs in the U.S., see Padideh Ala’I (2000), ‘Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience’, *Fordham International Law Journal*, 24(1):62-94. Also see Samuel Krislov (1963), ‘The *Amicus Curiae* Brief: From Friendship to Advocacy’, *The Yale Law Journal* 72(4):694-721

¹⁴⁷ See <http://www.merriam-webster.com/dictionary/amicus%20curiae>.

¹⁴⁸ Umbricht (2001), p.780.

¹⁴⁹ Gabrielle Marceau and Matthew Stilwell (2001), ‘Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies’, *Journal of International Economic Law*, p.158.

the first time to the panel in the *US – Gasoline* case in 1996¹⁵⁰ and to the AB report in the *EC-Hormones* case in 1998.¹⁵¹ However, *amicus curiae* briefs for these two cases were not taken into consideration. It was the *US-Shrimp* case that raised the issue of the acceptance of *amicus curiae* in the WTO dispute settlement process. In the *US-Shrimp case*, unsolicited *amicus curiae* briefs were submitted both to the Panel and to the AB. The Panel received *amicus* briefs from the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL), and India, Malaysia, Pakistan and Thailand requested the Panel not to consider the content of the *amicus* briefs in its examination of the matter under dispute. On the other hand, the U.S. argued that the Panel could seek information from any relevant source under Article 13 of the DSU.¹⁵² Article 13 of the DSU entitles panels to *seek information and technical advice from any individual or body* which it deems appropriate and....*may seek information from any relevant source and may consult experts to obtain their opinion* on certain aspects of the matter.¹⁵³ However, the Panel rejected the *amicus* briefs by stating that “accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied.”¹⁵⁴

When the U.S. appealed the Panel’s decision, the AB made an important conclusion that “a panel has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make*

¹⁵⁰ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (hereinafter *US – Gasoline*), WT/DS2/R, adopted 29 January 1996.

¹⁵¹ Appellate Body Report, *EC- Measures Affecting Mea and Meat Products* (hereinafter *EC – Hormones*), WT/DS26&48/AB/R, adopted 13 February 1998.

¹⁵² Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US – Shrimp-Turtles*), WT/DS58/R, adopted 15 May 1998, para.3.129.

¹⁵³ See Article 13 (*Right to Seek Information*) of Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes in WTO (2003).

¹⁵⁴ Panel Report, *US-Shrimp-Turtles*, para.7.8.

some other appropriate disposition thereof.”¹⁵⁵ The AB also found that the Panel’s reading of the word “seek” in Article 13 of the DSU was unnecessarily formal and technical. The Appellate Body, therefore, finally concluded that “the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU.”¹⁵⁶ Since this decision, several *amicus curiae* briefs have been submitted to panels and the AB, but there were not many briefs which were actually accepted and considered. The Implementation Panel (Article 21.5 DSU) of *Australia – Salmon* received an unsolicited letter from “Concerned Fishermen and Processor” in South Australia and decided the information submitted in the letter was relevant to its procedures and accepted this information as part of the record in pursuant with the authority granted to the Panel under Article 13.1 of the DSU.¹⁵⁷

While *amicus curiae* briefs were submitted to panels, there was another issue of whether the AB could accept and consider *amicus curiae* briefs. In *US – Lead Bars*, the AB clarified its position on the admission of *amicus curiae* briefs. It contended that neither the DSU nor the *Working Procedures* explicitly prohibit the acceptance or consideration of such briefs, and that Article 17.9 of the DSU makes clear that the Appellate Body has a broad authority to adopt procedural rules which do not conflict with any rules

¹⁵⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US – Shrimp-Turtles*), WT/DS58/AB/R, adopted 16 January 1998, para. 104.

¹⁵⁶ *Ibid.*, para.110. The Appellate Body also considered that the Panel acted within the scope of its authority under Article 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions. This decision means that the acceptance and consideration of *amicus curiae* briefs attached to the submissions of parties and third parties to the panel or the Appellate Body are not controversial.

¹⁵⁷ Panel Report, *Australia – Measures Affecting Importation of Salmon- Recourse to Article 21.5 by Canada*, WT/DS18/RW, adopted 18 February 2000, para.7.8.

and procedures in the DSU. Therefore, the AB found that it has the legal authority to decide whether or not to accept and consider any information that it believes is pertinent and useful in an appeal.¹⁵⁸ The decision of the AB in *US – Lead Bars* has also raised controversy among WTO Members and many Member states voiced their concerns. Some developing countries criticized the admission of *amicus curiae* briefs by NGOs stating that NGO participation through *amicus curiae* is only a part of the push made by the West to broaden the trade mandate to include labor and environmental issues.¹⁵⁹

In 2000, the most controversial decision regarding *amicus curiae* briefs was made by the AB in *EC – Asbestos*. The AB adopted, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*,¹⁶⁰ an additional procedure to deal with written submissions received from persons other than the parties and third parties to the dispute (the “Additional Procedure”).¹⁶¹ The Additional Procedure provided that the procedure was adopted in the interest of fairness and orderly procedure, and any person wishing to file a written brief with the AB must apply for leave to file such a brief. The application had to follow a length requirement, and include a description of the applicant, and the reason for desirability to grant the applicant leave to file

¹⁵⁸ Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (hereinafter *US – Lead Bars*), WT/DS138/AB/R, 10 May 2000, para.39.

¹⁵⁹ See Ala’I (2000), p.72.

¹⁶⁰ Rule 16(1) of the *Working Procedures for Appellate Review* stipulates: In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

¹⁶¹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EC – Asbestos*), WT/DS135/AB/R, 12 March 2001, para.51.

a written brief.¹⁶² When the applicant is granted leave to file a written brief with the AB, a written brief must in no case be longer than 20 typed pages and set out precise legal arguments.¹⁶³ The Additional Procedure was posted on the WTO website on November 8, 2000 and it provoked complaints from many WTO Members about the AB's decision and its apparent willingness to accept and consider *amicus curiae* briefs.¹⁶⁴ A majority of WTO Members opposed the admission of *amicus curiae* briefs at any level of WTO procedure and finally, a Special General Council meeting requested by Egypt was held on November 22, 2000. During the meeting, almost all the delegations made comments on the question of whether the AB or panels should receive or solicit *amicus* briefs and argued that *amicus* briefs should not be accepted since there were no relevant provisions in place. Moreover, most Members agreed that the rights and obligations under the DSU belonged only to the Members.¹⁶⁵ India argued that the AB had no competence or the mandate under the DSU to deal with unsolicited *amicus curiae* briefs or seek such

¹⁶² *Ibid.*, para.52. An application for leave to file such a written brief shall: (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant; (b) be in no case longer than three typed pages; (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the source of financing of the applicant; (d) specify the nature of the interest the applicant has in this appeal; (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief; (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

¹⁶³ *Ibid.*

¹⁶⁴ Bossche (2008), p.740.

¹⁶⁵ WT/GC/M/60, para.114.

briefs.¹⁶⁶ Switzerland maintained that the issue of *amicus curiae* briefs should be solved through negotiations and it was the Members' responsibility to legislate on it within the framework of the DSU review.¹⁶⁷ Other delegations also expressed their concerns about the Appellate Body's decision, but only the U.S. positively commented that the AB had acted appropriately in adopting its additional procedure in the asbestos appeal. It believed that the AB had the authority under Rule 16(1) of its *Working Procedures* to adopt the additional procedure.¹⁶⁸ The Chair of the General Council, in his concluding remarks, stated that, in light of the views expressed and in the absence of clear rules, the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed.¹⁶⁹ The AB, however, finally rejected all eleven requests for leave to file *amicus* briefs citing "failure to comply sufficiently with all the requirements" set out in the Additional Procedure.¹⁷⁰

3.4.1.2 Discussions on Admission of *Amicus Curiae* Briefs in the WTO

There were many arguments on the admission of *amicus curiae* briefs by panels or the Appellate Body before the decision of the AB was made on the Additional Procedure. Although a majority of WTO Members denied private parties' participation in the dispute settlement procedure, some legal scholars advocated participation in trade dispute settlement procedures by private

¹⁶⁶ *Ibid.*, para.39.

¹⁶⁷ *Ibid.*, para.64.

¹⁶⁸ *Ibid.*, para.74.

¹⁶⁹ *Ibid.*, para.120.

¹⁷⁰ Appellate Body Report, *EC – Asbestos*, para.56.

actors. Shell, by introducing the ‘Trade Stakeholders Model’ for global trade governance, emphasized the “direct participation in trade disputes not only by states and businesses, but also by groups that are broadly representative of diverse citizen interests.”¹⁷¹ He only mentioned *amicus curiae* briefs in the footnote, but explained that the Trade Stakeholders Model could operate within the context of world trade governance by requiring the WTO to open its dispute resolution system to all groups with a stake in the outcomes of trade decisions.¹⁷² Schuyler has also argued that the WTO dispute resolution system would be improved by permitting qualified private parties to submit *amicus* briefs.¹⁷³

Following the decision on *amicus curiae* briefs in *EC-Asbestos*, academic literature specifically written on the controversial issue of the admissibility of *amicus curiae* briefs proliferated in the early 2000s. Charmovitz, in dealing with the interaction between the WTO and the public, suggested that the WTO should establish procedures to enable NGOs and individuals to submit *amicus curiae* briefs to panels and to the Appellate Body in his conclusion.¹⁷⁴ Schneider, in his article on the *amicus* brief battle in the WTO, introduced three theories of judicial decision-making and explained the impact of *amicus* briefs according to each theory. Among the three theories- the legal model, the attitudinal model and the interest group model- the legal model shows that “*amicus* briefs are appropriate and legitimate ways of democratizing the WTO dispute resolution process and ensuring better

¹⁷¹ Shell (1995), p.910.

¹⁷² *Ibid.*, p.913.

¹⁷³ Glen T. Schuyler, ‘Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System’, *Fordham Law Review* 65(5):2275-2311.

¹⁷⁴ Charnovitz (2000), p.214.

decisions for all parties.”¹⁷⁵ Hollis has examined the emergence of *amicus curiae* in the WTO from the perspective of the erosion of sovereignty and argued that public participation does not erode sovereignty and private actor participation in international law would continue to occur with the consent of states. In his interpretation of the decision in the Asbestos case, the Asbestos controversy reflected the principle that states will continue to determine who may participate in the international legal order.¹⁷⁶ Marceau and Stilwell have examined practices regarding *amicus curiae* briefs in the WTO and in other international fora such as International Court Justice (ICJ), International Tribunal on the Law of the Sea (ITLOS) and the International Criminal Court, and in regional trade agreements. Based on this comparative study, they made practical suggestions for addressing the use and consideration of *amicus curiae* briefs in WTO dispute settlements. Among their seventeen suggestions, the first suggestion was that WTO Members should negotiate and agree on rules regarding the acceptance and consideration of *amicus* briefs to achieve legal certainty.¹⁷⁷ Umbricht has introduced arguments both for and against the admission of *amicus curiae* briefs in WTO dispute settlements and he concluded that *amicus curiae* briefs should only be allowed at the panel level, and not at the appellate level for systemic reasons. For more transparency, he suggested that the initial submission of the parties must be made public so that the non-state actors, after scrutinizing these submissions, can decide whether

¹⁷⁵ Andrea Kupfer Schneider (2001), ‘Unfriendly Actions: The Amicus Brief Battle at the WTO’, *Faculty Publications*, Paper 273.

¹⁷⁶ Duncan B. Hollis (2002), ‘Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty’, *Boston College International and Comparative Law Review* 25(2):235-255, p.254.

¹⁷⁷ Marceau and Stilwell (2001), pp.164-187.

their *amicus curiae* briefs can additionally contribute to the dispute settlement process.¹⁷⁸

After the active and broad discussion on the admissibility of *amicus curiae* briefs following the Asbestos case, the Appellate Body confirmed its case law on the authority of panels and the Appellate Body to accept and consider such briefs, but the AB has rarely accepted and considered *amicus curiae* briefs.¹⁷⁹ In 2007, the Warwick Commission presented its report on ‘The Multilateral Trade Regime: Which Way Forward?’ and urged “panels and the AB to be more open to the submission and consideration of *amicus curiae* briefs by non-state actors, including civil society.”¹⁸⁰

¹⁷⁸ Umbricht (2002), p.793.

¹⁷⁹ See Bossche (2007), pp.740-741.

¹⁸⁰ The Warwick Commission (2007), the Multilateral Trade Regime: Which Way Forward? – The Report of the First Warwick Commission, the University of Warwick, Chapter 2. The Commission also commented on the possible burden of *amicus* submission. In this regard, the Commission stated that “experience over the past decade suggests that this fear can be easily overstated,” and “in the unlikely event that *amicus* briefs are submitted in numbers that adversely affect the dispute settlement process, the Dispute Settlement Board could explore mechanisms to limit the number of submissions.”

3.4.1.3 Negotiations on *Amicus Curiae* Brief Submissions in the WTO

Even if panels and the Appellate Body have received *amicus curiae* briefs in practice, there is still legal uncertainty because WTO Members have not adopted any rules on *amicus curiae* briefs to date. Therefore, the admissibility of *amicus curiae* briefs by panels and the AB in the WTO is another issue that has been debated among Member states through negotiations on the DSU. It is known that there is a limited common ground among Members that only parties and third parties have the right to present submissions and be heard in panel proceedings. However, there is still opposition on the general acceptability of unsolicited briefs.¹⁸¹

The European Community (EC) initially maintained in 2002 that it was necessary to better define the framework and the conditions for allowing *amicus curiae* briefs and proposed a new Article on *amicus curiae* submissions. The new article stipulates that “the panel or the AB may permit unsolicited *amicus curiae* submissions, provided that the panel or the AB has determined that they are directly relevant to the factual and legal issues.”¹⁸² The U.S. also mentioned the necessity to consider whether it would be helpful to propose guideline procedures for handling *amicus curiae* submissions in 2002 and also in 2006, but did not believe an amendment to the DSU was necessary.¹⁸³ In 2015, the U.S. presented a non-paper which proposes a

¹⁸¹ TN/DS/27, para.3.23-3.24.

¹⁸² Special Session on DSB, Contributing of the EC and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, 13 March 2002.

¹⁸³ Special Session on DSB, Contributing of the US to the Improvement of the WTO Dispute Settlement Understanding of the WTO related to Transparency, TN/DS/W/13, 22 August 2002. See also Special Session on DSB, Contributing of the US to the Improvement of the WTO

decision by the DSB, containing procedures for the use of WTO adjudicators to handle the submission of *amicus curiae* briefs.¹⁸⁴ However, proponents and opponents of *amicus curiae* briefs among WTO Members have not found a consensus yet and it seems it will take time before they reach a conclusion. As the Chairman observed “participants approached this issue from very different standpoints” and he sought to “explore whether there was any manner in which the two positions could be bridged.”¹⁸⁵

The current consolidated draft on the admissibility of *amicus curiae* briefs as shown in Box 3 demonstrates that the submission of unsolicited *amicus curiae* cannot be accepted at both levels of panels and the AB. On the other hand, some Members contend that “regulating the timing of *amicus* briefs, their length and the procedures to address the admissibility and content of *amicus* briefs would ensure that appropriate guarantees are in place to manage such briefs.” They argue that this would improve the current *ad hoc* practice of accepting *amicus curiae* and that it would enhance the image of the WTO and the dispute settlement system.¹⁸⁶ The longstanding controversy surrounding *amicus curiae* submissions in WTO dispute settlements reveals that private parties’ participation in the WTO in any form and at any level is still not favorably considered and accepted by WTO Members.

Dispute Settlement Understanding of the WTO related to Transparency, TN/DS/W/86, 21 April 2006.

¹⁸⁴ Report by the Chairman, Special Session of the DSB, TN/DS/26, 30 January 2015, para. 101-102.

¹⁸⁵ TN/DS/26, para.108.

¹⁸⁶ TN/DS/25, pp.38-39.

Box 3. Consolidated Draft Legal Text on Acceptability of *Amicus Curiae*

Article 13 of the DSU
Right to Seek Information

3. [In exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it.]

Article 17 of the DSU
Appellate Review

(e) [The Appellate Body shall consider only the submissions of parties and third [participants], and shall not accept or consider any submission beyond those submitted by the parties and the third [participants].]

3.4.2 Acceptance of *Amicus Curiae* Brief Submissions in Regional Trade Agreements

While the admission of *amicus curiae* briefs has been controversial in the WTO, some regional free trade agreements (FTA) that the U.S. has concluded contain explicit references to *amicus* briefs. It is referred to in chapters on investment. The U.S.-Singapore FTA was the first agreement that contained articles on the submission of *amicus* briefs and the *amicus* text has become more specific in its subsequent FTAs. The Korea-U.S. FTA also has similar text defining the scope of *amicus* briefs. The Trans-Pacific Partnership (TPP) that the U.S. has recently signed with eleven Trans-Pacific countries has also included a rule on *amicus* briefs and set out procedures for the submission of such briefs.¹⁸⁷ The relevant texts of the Korea-U.S. FTA and the TPP are illustrated in Box 4.

Box 4. Rules on Acceptance of *Amicus Curiae* in Regional Trade Agreements

<Korea-U.S. Free Trade Agreement>

Chapter 11

Investment

Article 11.20: Conduct of the Arbitration

5. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

¹⁸⁷ See the text of Trans-Pacific Partnership, paragraph 3 of Article 9.22 (Conduct of the Arbitration) in Chapter 9 (Investment).

(a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;

(b) the *amicus curiae* submission would address a matter within the scope of the dispute; and

(c) the *amicus curiae* has a significant interest in the proceeding.

The tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

<Trans-Pacific Partnership Agreement>

Chapter 9

Investment

Article 9.22: Conduct of the Arbitration

After consultation with the disputing parties, the tribunal *may accept and consider written amicus curiae submissions* regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

Even though the term *amicus curiae* is not directly mentioned in the text, the free trade agreements that the U.S. is involved in provide the rules on

the acceptance of written views from NGOs located in the territories of the parties to the agreements. The Korea-U.S. FTA and the TPP Agreement have similar texts in this regard as shown in Box 5.

Box 5. Rules on Acceptance of Written Views from NGOs in the Korea-U.S. FTA and TPP Agreement

<Korea-U.S. Free Trade Agreement>

Chapter 22

Institutional Provisions and Dispute Settlement

Article 22.10: Rules of Procedures

1. By the date this Agreement enters into force, the Parties shall establish model rules of procedure, which shall ensure:
 - (e) that the panel shall consider requests from non-governmental entities located in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties;

<Trans-Pacific Partnership Agreement>

Chapter 28

Dispute Settlement

Article 28.13: Rules of Procedure for Panels

The Rules of Procedure, established under this Agreement in accordance with Article 27.2.1(f) (Functions of the Commission), shall ensure that:

- (e) the panel shall consider requests from non-governmental entities located in the territory of a disputing Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties;

On the other hand, the Korea-EU FTA provides specific rules on the acceptance of *amicus curiae* in the arbitration procedure as depicted in Box 6.

Unlike the general text in the Korea-U.S. FTA and the TPP Agreement, the Korea-EU FTA set out procedural rules for the timeline and length of written submissions and the description of the person making the submission.

Box 6. Rules on Acceptance of *Amicus Curiae* in the Korea-EU FTA

<Korea-EU Free Trade Agreement>

Annex 14-B

Rules of Procedure for Arbitration

Article 11: Amicus Curiae Submissions

1. Unless the Parties agree otherwise within three days of the date of the establishment of the arbitration panel, the arbitration panel may receive unsolicited written submissions from interested natural or legal persons of the Parties, provided that they are made within 10 days of the date of the establishment of the arbitration panel, that they are concise and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the factual and legal issues under consideration by the arbitration panel.
2. The submission shall contain a description of the person making the submission, whether natural or legal, including its nationality or place of establishment, the nature of its activities and the source of its financing, and specify the nature of the interest that the person has in the arbitration proceeding.
3. The arbitration panel shall list in its ruling all the submissions it has received that conform to paragraphs 1 and 2. The arbitration panel shall not be obliged to address in its ruling the factual or legal arguments made in such submissions. Any submission obtained by the arbitration panel under this Article shall be submitted to the Parties for their comments.

3.5 Analysis and Conclusion

From its birth, the WTO had to deal with criticism and concerns with regard to its legitimacy and democratic governance. It can be said that the WTO cannot achieve democratic legitimacy at the same level as nation-states due to its intrinsic intergovernmental nature and the lack of its own constituents. Nevertheless, the WTO cannot deny the reality that private parties including businesses and civil society, expect and demand more active involvement in the decision-making process and dispute settlement procedure of the WTO. As witnessed in the Seattle debacle, the decision-making process itself can be blocked if interested parties and civil society feel that their voices and opinions are not being heard before and during the decision-making process.

Therefore, the WTO has made various efforts to enhance its legitimacy by engaging private parties for the past 20 years. The Annual Report of the WTO has a section titled ‘Outreach,’ and the WTO also introduces its annual activities through the Public Forum and holds informal dialogue sessions with NGOs. Among these activities, formal and institutionalized public engagement channels at the WTO can be summarized according to the three levels of engagement in Table 7.

Table 7. An Analysis of Public-Private Relationships in Trade Policy-making at the WTO Level

	Rule-making (Negotiations)	Implementation (Dispute Settlement)
Transparency	<ul style="list-style-type: none"> • Access to documents • Attendance at plenary meetings of the Ministerial Conference • NGO Briefings 	<ul style="list-style-type: none"> • Opening of panel and Appellate hearings
Consultation	<ul style="list-style-type: none"> • Public Forum 	n/a
Participation	n/a	<ul style="list-style-type: none"> • Acceptance of <i>amicus curiae</i> brief submissions

Source: Author's analysis

As discussed earlier, transparency serves as a base upon which the next levels of consultation and participation are built. At the rule-making stage, access to documents and information, both off-line and online, and attendance at the plenary meetings of the Ministerial Conference have much contributed to enhancing transparency. NGO briefings can also be included in the mechanisms for facilitating transparency. The Public Forum, which has annually been held and attracted more than 1,000 participants a year, is now considered as WTO's most representative outreach activity that engages interested parties. Among the three levels of public engagement, the Public Forum can be categorized as a consultation mechanism even though private parties cannot play an advisory or consultative role in the decision-making process within the narrow definition of consultation. The Public Forum serves, at least, as a dialogue channel through which views and opinions of interested parties can be presented and exchanged, and they can thus indirectly affect the

decision-makers from Member states. However, there is no mechanism, which can be defined as participation of private parties at the decision-making stage.

At the implementation stage, the opening of panel and Appellate hearings to the public is linked to enhancing transparency, and the acceptance of unsolicited *amicus curiae* submissions by interested parties provides a means of public participation in the dispute settlement procedure. Currently, it seems there is no mechanism at the implementation stage that corresponds to public consultation. Even though panel and Appellate hearings are open to the public upon the request of the parties to a dispute and unsolicited *amicus* briefs have been considered by the panels and the AB, there are still no set rules and legal procedures for these mechanisms under the DSU. With regard to the issue of *amicus curiae* briefs, some Members are in fact against the acceptance of *amicus* briefs and have even made a proposal during the negotiations on the DSU, to prohibit the current practice of accepting and considering *amicus* briefs both at the panel and AB level.

However, as examined in some cases of free trade agreements which involve the U.S. and EU, who are strong supporters of engaging private parties in the dispute settlement system, the rules on opening panel hearings and accepting *amicus* briefs are already included in the agreements. It implies that more Members of the WTO will accept such rules in the context of regional free trade agreements, which are also, in nature, intergovernmental.

The examination of mechanisms for building public-private relationships at the WTO according to the levels of engagement under each stage of trade policy-making has shown that efforts to engage private parties are still mainly focused on enhancing transparency. Moreover, concrete mechanisms for public engagement at the implementation stage have not even

been institutionalized. Even though the WTO has tried to enhance its legitimacy through various initiatives to engage non-state actors, it has not yet achieved its full potential in this regard.

Chapter 4

Public-Private Relationships in Trade Policy-making at the National Level

While there have been multifaceted efforts to enhance transparency and engage private actors in trade policy-making at the international level, it has been emphasized that it is the Member governments that must take primary responsibility in developing public-private relationships with regard to domestic decision-making procedures in trade policy. Scholars and trade experts have also highlighted the importance of national trade policy-making and governments' efforts to engage private actors in the decision-making process because enhancing legitimacy in such a way is necessary to maintain social cohesion and broad support for trade policy.¹⁸⁸ Wolfe has stated that "trade policy democracy begins at home, not in Geneva," and "consultations with citizens and economic actors are a fundamental part of making good trade policy."¹⁸⁹

There have been a number of studies on public-private relationships in trade policy-making at the national level, but most of them dealt with case studies.¹⁹⁰ Therefore, they are more descriptive than analytical and thus, their findings are rather limited in scope from the analytical perspective. In this chapter, the major mechanisms for public engagement in the U.S. and EU will

¹⁸⁸ Capling and Low ed. (2010), p.7.

¹⁸⁹ Wolfe and Helmer (2007), p.1.

¹⁹⁰ Capling and Low ed. (2010) deal with case studies of eight countries: Chile, Colombia, Mexico, Indonesia, Thailand, Jordan, Kenya, and South Africa. INTAL-IT-STA (2002) includes seven American countries: Argentina, Brazil, Canada, Chile, Colombia, Mexico, and the United States. Halle and Wolfe ed. (2007) explore case studies of three developed and three developing countries: Canada, Netherlands, Norway, Brazil, India, and South Africa.

be examined and then analyzed with the framework suggested in Chapter 2. There are several reasons why the U.S. and the EU were chosen for examination. First, it is necessary to overview the mechanisms of countries which engage private actors more actively in trade policy-making. The positions that the U.S. and the EU have taken in the negotiations on the DSU revealed that they are more open to public engagement than other Member states. As examined in the previous Chapter, both the U.S. and the EU have inserted rules on public hearings and the admission of *amicus curiae* briefs in regional free trade agreements that they have concluded. Comparing public engagement in the U.S. and the EU is also meaningful because the mechanisms in the U.S. exemplify well-established public engagement by laws, while the EU has principle-based and policy-based mechanisms for public-private relationships.

4.1 Public-Private Relationships in U.S. Trade Policy-making

4.1.1 Consultation with the Public

4.1.1.1 Consultation Channels in Trade Policy-making Process

Before exploring the consultation mechanism for trade policy-making in the U.S., it is necessary to understand the unique characteristics of its decision-making process in the field of trade. First, the U.S. is one of the few countries in the world which has a federal system and thus, its subnational units, or states, also have considerable authority on trade issues. Second, the U.S.

Congress has more power than the executive branch in trade policy-making since the U.S. Constitution prescribes that the final authority on levying duties rests on Congress, while the President has the power to make treaties including trade agreements.¹⁹¹ The second characteristic makes the U.S. system somewhat different from other countries because the role of legislative bodies in most countries is weak and limited in power in trade policy-making.

Since the U.S. Congress also plays an important role in monitoring and maintain pressure on trade policy-making, there are two major channels for consulting interested parties and diverse stakeholders: the executive branch consultative process and the congressional consultative process.

The Executive Branch Consultative Process

There are many government agencies that are involved in trade policy-making and among them are the core trade policy agencies which are the Office of the United States Trade Representative (USTR), United States International Trade Commission (USITC), and the International Trade Administration (ITA) of the Department of Commerce (DOC).¹⁹² When it comes to trade policy in the U.S., the Office of the USTR is the coordinating government agency, which makes the U.S. system very unique. Normally, the ministry of foreign affairs or ministry of industry in other countries carries out the same functions as the

¹⁹¹ Section 8 in Article 1 of the US Constitution prescribes that “the Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States....” And according to Section 2 in Article 2 of the Constitution, “the President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.....” Due to these constitutional regulations, there were tensions between executive and legislative branches in trade policy-making. In 1934, however, Congress began to delegate much of its authority over trade policy to the executive branch.

¹⁹² See Craig VanGrasstek (2008), ‘The Challenges of Trade Policymaking: Analysis, Communication and Representations’, *Policy Issues in International Trade and Commodities Study Series* No. 36, UNCTAD, pp.17-18

office of the USTR. Its primary responsibility is to develop and coordinate the implementation of U.S. international trade policy, including commodity and direct investment. USTR also serves as the principal advisor to the President on international trade policy and the chief representative for international trade negotiations.¹⁹³ The USITC is an independent commission that advises the executive and legislative branches on trade policy issues. Usually on request by the Office of the USTR or a congressional committee, the USITC conducts studies on economic prospects or consequences of specific trade agreements, and provides advice regarding the economic implications of such agreements for U.S. industries and the economy.

The development of trade and investment policy involves diverse government agencies and thus, requires an interagency deliberative process with multiple layers. At the top of the decision-making process is the President's cabinet, but since the Clinton administration, trade policy has fallen within the sphere of the National Economic Council (NEC). The NEC, presided by the President, deals only with issues that are of great importance.¹⁹⁴ Beneath it are two sub-cabinet bodies: the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC). The TPRG is chaired by a deputy USTR and composed of representatives from relevant executive branch agencies at or near the Assistant or Secretary level. On the next level down, the senior working-level decision making process takes place in the TPSC. The TPSC is chaired by an assistant USTR or deputy-assistant USTR, and includes Deputy Assistant Secretaries and Office Directors.¹⁹⁵ The

¹⁹³ See Chapter 4 (Office of the United States Trade Representative) of Trade Act of 1974 (As amended through P.L. 114-27, enacted June 29, 2015).

¹⁹⁴ VanGrasstek (2008), p.16.

¹⁹⁵ Executive branch agencies on the TPSC and the TPRG include Council of Economic Advisors, Council on Environmental Quality, Department of Agriculture, Department of

TPSC Subcommittees handle the working-level decision making process and consist of dozens of committees based on region, country, sectors and functions.¹⁹⁶ Usually it is at the TPSC level where information and views of interested stakeholders are solicited through *Federal Register* notices and/or public hearings as shown in Figure 5. The information and views received from outside the government are considered and discussed in the internal deliberative process. For example, USTR and the Department of Labor initiated an employment impact review of the Trans-Pacific Partnership (TPP) Agreement through the TPSC, and public comments on this issue were solicited through a notice on *Federal Register* in December 2015.¹⁹⁷

Another channel through which private stakeholders can submit their opinions with regard to trade policy issues is the USITC. The USITC also holds public hearings and solicits written comments from interested parties when providing advice to USTR or submitting reports to Congress upon request. The USITC also plays an important role of providing confidential advice to USTR regarding trade negotiations. The Commission, prior to negotiations, prepares information on import-sensitive products and promising products for U.S. exporters. Such studies are based not only on statistical data analysis, but also on public hearings and written comments from diverse stakeholders. For example, on August 7, 2015, the USITC registered a notice

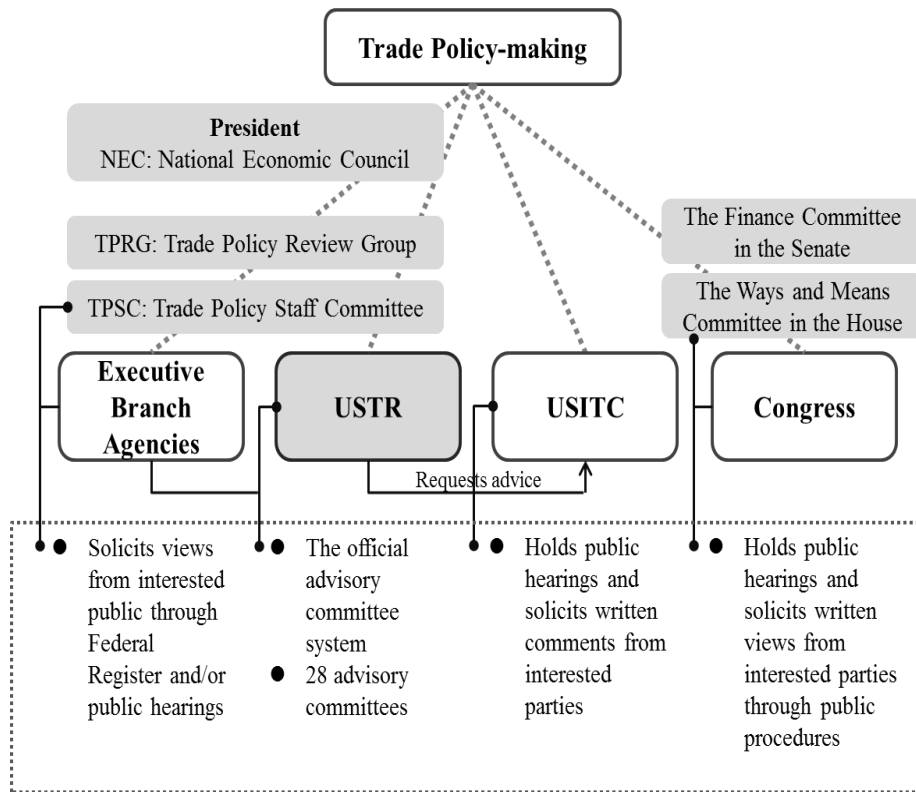
Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of Treasury, Environmental Protection Agency, Agency for International Development, National Economic Council, National Security Council, Office of Management and Budget, and US International Trade Commission (non-voting member). See <https://ustr.gov/about-us/executive-branch-agencies-trade-policy-staff-committee-and-trade-policy-review-group>.

¹⁹⁶ Joe E. Huenemann (2013), 'On the Trade Policy-Making Process in the United States', in INTAL-ITD-STA, *The Trade Policy-Making Process*, p.68.

¹⁹⁷ See <https://www.federalregister.gov/articles/2015/12/28/2015-32294/request-for-public-comments-on-review-of-employment-impact-of-the-trans-pacific-partnership>.

on the launch of an investigation and the scheduling of a public hearing in November, and gave a deadline for written comments which was early February 2016. This was for the purpose of preparing reports on the economic impact of trade agreements implemented under the Trade Authorities Procedures, required by Section 105(f)(2) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

Figure 5. Channels for Public Engagement in U.S. Trade Policy



Source: Summarized by Author

The most well-structured consultation mechanism under the executive branch is the official advisory committee system, which will be discussed later in more detail. The system was established by Congress in 1974 to ensure that private actors with a stake in trade policy can provide information and advice before and during trade negotiations. The first part of Section 135 under Chapter 3 of the Trade Act of 1974¹⁹⁸ prescribes that:

¹⁹⁸ See Trade Act of 1974 (as amended through Public Law 114-27, Enacted June 29, 2015).

(1) The President shall *seek information and advice from representative elements of the private sector* and the non-Federal governmental sector with respect to-

(A) negotiating objectives and bargaining positions before entering into a trade agreement under this title or section 103 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015;

(B) the operation of any trade agreement once entered into, including preparation for dispute settlement panel proceedings to which the United States is a party; and.....

To the maximum extent feasible, such information and advice on negotiating objectives shall be sought and considered before the commencement of negotiations.

(2) The President shall *consult with representative elements of the private sector* and the non-Federal governmental sector on the overall current trade policy of the United States. The consultations shall include, but are not limited to, the following elements of such policy:

(A) the principal multilateral and bilateral trade negotiating objectives and the progress being made toward their achievement.

(B) the implementation, operation, and effectiveness of recently concluded multilateral and bilateral trade agreements and resolution of trade disputes.

(C) the actions taken under the trade laws of the United States and the effectiveness of such actions in achieving trade policy objectives.

(D) important developments in other areas of trade for which there must be developed a proper policy response.

- (3) The President shall take the advice received through consultation under paragraph (2) into account in determining the importance which should be placed on each major objective and negotiating position that should be adopted in order to achieve the overall trade policy of the United States.

As prescribed above, the U.S. trade law states that it is necessary for the executive branch represented by the President to seek information and/or advice from and consult with private actors not only before launching negotiations on a new trade agreement, but also during the negotiations, and on the implementation of such trade agreements.

The Congressional Consultative Process

Even though the U.S. Congress has granted the authority to negotiate trade agreements to the President, Congress itself has deliberated on trade policy and trade agreements through public hearings or the solicitation of written comments as shown in Figure 4. Among a number of congressional committees in both the House of Representatives and the Senate, the committees in charge of trade policy-making and trade agreements are the Ways and Means Committee in the House and the Finance Committee in the Senate. Both the Chair and the Ranking Member of both committees are official advisors to the executive branch on trade policy-making.¹⁹⁹ However, as the scope of the trade agenda has expanded, other congressional committees involving financial services, banking, agriculture, environment, and labor have also developed a keen interest in trade issues and trade agreements.

¹⁹⁹ Huenemann (2013), p.69.

The most common way to hear public opinion is through public hearings where witnesses are invited to testify before congressional committees. Through these public hearings, various interested parties and stakeholders have an opportunity to publicly provide their insight and information on trade policy and trade agreements. Congress also solicits written views and comments from the public, and it is also common for constituencies to write their opinions on trade issues to their respective congressional representative or Senator.²⁰⁰

4.1.1.2 The Official Advisory Committee System

One of the most successful consultation channels with the public on trade policy in the U.S. is the official advisory committee system, which was established in 1974. By enacting the Trade Act of 1974, Congress mandated the establishment of a private sector advisory system to ensure that U.S. trade policy and trade negotiating objectives would adequately reflect its public and private sector interests. Under Section 135 of the Trade Act of 1974, the law provides:

Section 135. Advice from private and public sector.

(b) Advisory Committee for Trade Policy and Negotiations.-

(1) The President shall establish an *Advisory Committee for Trade Policy and Negotiations* to provide overall policy advice on matters referred to in subsection (a). The committee shall be composed of not more than 45 individuals and shall include

²⁰⁰ *Ibid.*, pp.69-70.

representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, nongovernmental environmental and conservation organizations, and consumer interests. The committee shall be broadly representative of the key sectors and groups of the economy, particularly with respect to those sectors and groups which are affected by trade. Members of the committee shall be recommended by the United States Trade Representative and appointed by the President for a term of 4 years or until the committee is scheduled to expire.

According to Section 135, individual general policy advisory committees for industry, labor, agriculture, services, investment, defense, and other interests may be established under the President's Advisory Committee for Trade Policy and Negotiations (ACTPN). On a level down, sectoral or functional advisory committees, as may be appropriate, can also be established. This advisory system is described as a three-tier structure of committees aimed to advise the President on overall U.S. trade policy, general policy areas, and technical aspects of trade agreements as illustrated in Figure 6.²⁰¹ The advisory committee system currently consists of 28 advisory committees with a total membership of approximately 700 citizen advisors.²⁰² The members of the advisory committees serve without either compensation or reimbursement of expenses.²⁰³

The top tier is the ACTPN, which provides overall policy advice to the President. The committee is composed of no more than 45 individuals and

²⁰¹ United States General Accounting Office (GAO) (2002), 'Advisory Committee System should be updated to better serve U.S. Policy Needs', Report to the Ranking Minority Member, Committee Finance, U.S. Senate.

²⁰² See USTR homepage at ustr.gov/about-us/advisory-committees.

²⁰³ Office of the USTR, Charter of the Advisory Committee for Trade Policy and Negotiations.

they are recommended by USTR and appointed by the President for a term of 4 years. The current members of the ACTPN include CEOs of corporations, and presidents of research institutions and industry alliances.²⁰⁴

On the second tier, there are currently six policy advisory committees, the members of which are appointed by USTR in consultation with the Secretariat of Commerce, Defense, Labor, Agriculture, the Treasury, and other executive departments. Among the six committees, the ones managed solely by USTR are the Intergovernmental Policy Advisory Committee (IPAC) and the Trade Advisory Committee on Africa (TACA). Those jointly managed by USTR with other relevant departments or agencies are the Trade Agricultural Policy Advisory Committee (APAC), Industry Trade Advisory Committees (ITAC), Labor Advisory Committee (LAC), and the Trade and Environment Policy Advisory Committee (TEPAC).

The third tier provides technical advice and information, and there are currently 22 sectoral technical advisory committees in industry and agriculture. The members of these committees are also appointed by the USTR in consultation with the relevant secretariats. There are 16 sectoral

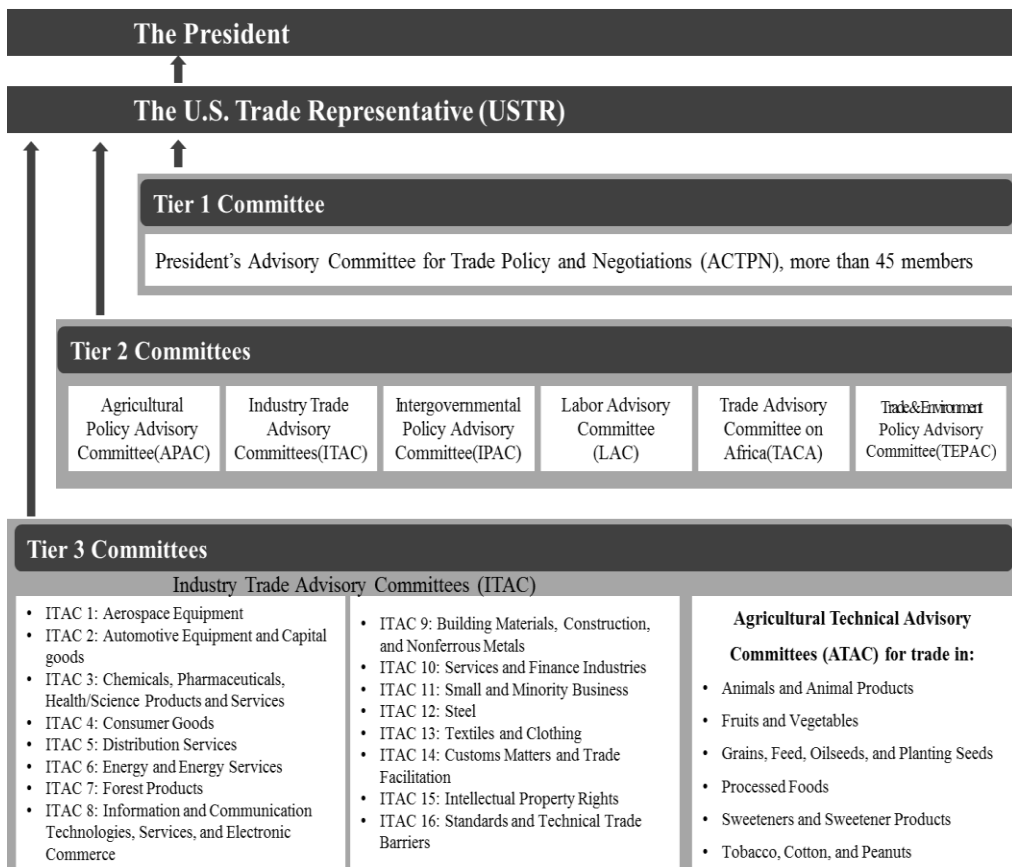
²⁰⁴ The current members of the ACTPN are: Jill Appell (Co-owner of Appell's Pork Farms), Ajay Banga (President and CEO of Mastercard), C. Fred Bergsten (Senior Fellow of Peterson Institute), John Bilbrey (CEO of Hershey's), Chad Dickerson (CEO of Etsy), Victoria A. Espinel (President of BSA The Software Alliance), Dean Garfield (President and CEO of Informational Technology Industry Council), Leo W. Gerard (International President of United Steelworkers, Gary Hirshberg (Chairman of the Board of Stoneyfield Farms), James P. Hoffa (International President of International Brotherhood of Teamsters), Sandra Kennedy (President of Retail Industry Leaders Association), David H. Long (CEO and Chairman of Liberty Mutual Insurance Group), Todd McCracken (President of National Small Business Association), Harold McGraw III (Chief Executive Officer of The MacGraw-Hill Companies), Wade Randlett (Founder of Randlett Renewables), Matthew Rubel (Senior Advisor of Roark Capital Group), David H. Segura (Chief Executive Officer of VisionIT), Bob Stallman (President of American Farm Bureau Federation), Robert J. Stevens (Executive Chairman of Lockheed Martin), and Dennis D. Williams (President of United Automobile Workers). See USITC homepage at Advisory Committee.

Industry Trade Advisory Committees (ITAC), including manufacturing, services, intellectual property rights and technical barriers, and they are co-administered by USTR and the Department of Commerce. The Industry Trade Advisory Center, located in the Department of Commerce, provides administrative support to all ITACs. Information on ITACs is published on the website of the International Trade Administration under the Department of Commerce, and the ITAC operational manual describes its requirements for membership eligibility and the nomination process, organizational structure, and security matters.²⁰⁵ In the agricultural field, there are 5 sectoral Agricultural Technical Advisory Committees (ATACs) for trade in animal products, fruits and vegetables, grains, processed foods, sweetener products, tobacco, cotton and peanuts. Information on the APAC and ATACs are available on the website of the Foreign Agricultural Service under the Department of Agriculture.²⁰⁶

²⁰⁵ See ITAC Operational Manual prepared jointly by the Industry Trade Advisory Center, Department of Commerce and the Office of the USTR for Intergovernmental Affairs and Public Engagement Office of the USTR. It can be downloaded at ITA homepage, ita.doc.gov/itac/index.asp.

²⁰⁶ See www.fas.usda.gov/topics/trade-advisory-committees.

Figure 6. Trade Advisory Committee Structure



Source: Updated by Author based on information from GAO.²⁰⁷

The primary role of members of the advisory committees is to provide information and advice on trade issues and trade agreements. During the conclusion of trade negotiations, the ACTPN and each appropriate advisory committee are required to meet to provide a report on a given agreement to the President, Congress and USTR. The report is expected to include “an advisory opinion as to whether and to what extent the agreement promoted the economic interests of the U.S. and achieves the applicable

²⁰⁷ United States General Accountability Office (GAO) (2002), p.9.

overall and principal negotiating objectives.”²⁰⁸ The report from the appropriate sectoral committee will include “an advisory opinion as to whether the agreement provides for equity and reciprocity within the sector or within the functional area.”²⁰⁹

Even if the purpose of the advisory committee system is to reflect U.S. commerce and economic interests in trade policy and trade agreements, the scope of participation by the committee members is defined as follows:

Nothing contained in this section shall be construed to authorize or permit any individual to participate directly in any negotiation of any matters referred to in subsection (a). To the maximum extent practicable, the members of the committees established under subsections (b) and (c), and other appropriate parties, shall be informed and consulted before and during any such negotiations. They may be designated as advisors to a negotiating delegation, and may be permitted to participate in international meetings to the extent the head of the United States delegation deems appropriate. However, *they may not speak or negotiate for the United States*.²¹⁰

As prescribed by law, the members of the advisory committees can participate as an advisor to a negotiating delegation, but cannot serve as a negotiator representing the U.S.

²⁰⁸ Trade Act of 1974, (e) Meeting of Advisory Committee at Conclusion of Negotiations under Section 135.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*, (k) Scope of participation by Advisory Committees.

4.1.1.3 Consultation Mechanism after the Trade Promotion Authority of 2015

Since the legislative body represents the interests of its constituencies, it is very natural for the legislative body to put pressure on the executive branch to engage itself and the public in the policy-making process. The U.S. Congress has played such a role by enacting laws which mandate the President to seek public opinion and information on trade policy to reflect the commercial and economic interests of interested parties and stakeholders as previously examined. Congress renewed the advisory committee system's mandate by enacting the Bipartisan Trade Promotion Authority Act of 2002 and establishing the U.S. Government Accountability Office (GAO), which is an independent and nonpartisan agency that works for Congress.

When Congress passed the Bipartisan Congressional Trade Priorities and Accountability Act of 2015,²¹¹ the new Trade Promotion Authority (TPA) in it strengthened the role of congressional oversight and transparency in trade negotiations.²¹² In the pre-negotiation stage, the new obligation is to publish, on the publicly available website of the Office of the USTR, a detailed and comprehensive summary of the specific objectives with respect to the

²¹¹ “The Bipartisan Congressional Trade Priorities and Accountability Act of 2015” is a newly approved Trade Promotion Authority (TPA, previously titled as ‘Fast Track Authority). Since 1974, Congress has enacted TPA legislation that defines US negotiating objectives and priorities for trade agreements and establishes consultation and notification requirements for the President follow throughout the negotiation process. At the end of the negotiation and consultation process, Congress gives the agreement an up or down vote, without amendment. See USTR homepage, <https://ustr.gov/trade-agreements/other-initiatives/Trade-Promotion-Authority>.

²¹² The insertion of provisions that strengthen the congressional role and transparency was due to Senate Finance Committee ranking member, Ron Wyden's influence. See William Watson (2015), “What's Really in the New Trade Promotion Authority Bill?” CATO at liberty (blog). April 20, 2015 (2:44 pm), <http://www.cato.org/blog/whats-really-new-trade-promotion-authority-bill>.

negotiations, and a description of how the agreement will further these objectives and benefit the U.S., at least 30 calendar days before initiating negotiations.²¹³ It is evaluated that this new obligation will allow the public to engage in debate more effectively without resorting to conspiracy claims or wild theories.²¹⁴

Compared to the most recent TPA in 2002, Section 2107 which was titled the “Congressional Oversight Group” has been replaced by Section 104 named “Congressional Oversight, Consultations, and Access to Information.” Among the newly added obligations, it is noteworthy that ‘any Member of Congress’ has, upon request, access to ‘pertinent documents relating to the negotiations, including classified materials.’ Section 104 of the TPA also makes it mandatory for each Advisory Group on negotiations under Congress to consult with and advise USTR regarding the formulation of specific objectives, negotiating strategies and positions, development of applicable trade agreements, and compliance and enforcement of negotiated commitments under the trade agreements.

According to Section 104 of the Trade Priorities Act of 2015, USTR is required to provide written guidelines for public engagement in consultation with the Chair and the Ranking Members of the Ways and Means and the Finance Committee. The purpose of the guideline is to facilitate transparency, encourage public participation, and promote collaboration in the negotiation process. With regard to consultations with advisory committees, USTR is also obliged to develop written guidelines on enhanced coordination with advisory committees established pursuant to Section 135 of the Trade Act of 1974.

²¹³ U.S. Public Law 114-26, Section 105 (Notice, Consultations, and Reports), paragraph (a) (1) (c).

²¹⁴ Watson (2015).

As required by Sections 104(d)(1) of the Trade Priorities Act of 2015, USTR issued ‘Guidelines for Consultation and Engagement Office of the USTR’ in October 2015. To facilitate public transparency, USTR will provide timely information directly to the public through the media and online, and release a detailed strategic plan on its overall mission, goals and objectives on a regular basis. Additionally, the text of trade agreements will be made available online for public review no fewer than 60 days before the President signs the agreements. In terms of encouraging public participation and promoting collaboration in the negotiating process, USTR will issue *Federal Register* notices for every trade agreement, motivating interested parties and the public to submit comments, recommendations, or concerns and make all non-confidential comments available electronically on the Federal Register website. USTR will also arrange and host public hearings and public stakeholder briefing events which will serve as a forum for diverse stakeholders to make proposals and communicate with U.S. negotiators.²¹⁵

USTR also provided guidelines for engaging the advisory committees to enhance coordination among the committees. USTR will brief the trade advisory committees regarding ongoing and future negotiations on a regular basis and these briefings will be timely, in-depth, and comprehensive. With regard to accessing negotiating text, USTR will endeavor to provide U.S. proposals to all the trade advisory committee members to solicit their feedback and to respond to that feedback in advance of sharing them with negotiating partners.²¹⁶ Additionally, USTR, pursuant to the TPA in 2015, will appoint an agency official to serve as the ‘Chief Transparency Officer’ to

²¹⁵ Guidelines for Consultation and Engagement Office of the USTR, available at the homepage of Office of the USTR.

²¹⁶ *Ibid.*

advise on transparency policy, and engage and assist the public in understanding trade negotiations.²¹⁷

4.1.1.4 TRIPS Agreement and the Role of Private Actors

The trade advisory system of the U.S. has been evaluated as a valuable system that helped the United States conclude economically beneficial trade agreements. The strength of the consultation mechanism in the U.S. comes from its trade advisory committees and their role as an active trade agenda-setter which goes beyond the provision of information and advice to USTR and officials in other departments. The advisory committees can actively suggest new trade agenda to pursue or protect the economic interests of relevant industries and also persuade the executive and/or legislative body to initiate domestic trade policy-making or related legislations.

Such active agenda-setting by U.S. industries through the consultation mechanism and their own coalitions have also taken place to protect intellectual property (IP) in overseas markets. The issue of protecting IP, which was first raised in the U.S., was put on the table of the Uruguay Round negotiations and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was finally concluded in the context of the Uruguay Round of the General Agreement on Tariffs and Trade talks. Therefore, it was said that TRIPS was driven mainly by U.S. industries such as pharmaceuticals, entertainment, agrochemicals, and computer software. It was also evaluated as a successful result of public-private partnership in an

²¹⁷ *Ibid.*, Also refer to paragraph (f)(1)(2)(3) of Section 104 of Public Law 114-26.

international trade negotiation.²¹⁸ Sell has also mentioned that “private sector actors have played a major role in catapulting the previously arcane issue of IP protection to the top tier of the U.S. trade agenda, and have been able to enlarge the range of options for both themselves and U.S. policymakers by linking IP protection to international trade.”²¹⁹

There have been controversies and diverging opinions on linking IP protection with trade under the multilateral trade regime, however, this discussion lies outside the scope of this thesis. The focus will instead be placed on how interaction between private actors, mainly U.S. industries, and the executive body operated and affected the process of getting IP on the multilateral trade agenda.

Trade-related Intellectual Property in the U.S.

The history of linking IP protection to trade traces back to the late 1970s when U.S. knowledge-based industries began to recognize the importance of IP protection in overseas markets. In the areas of pharmaceutical or chemical industries, U.S. companies argued that their incentive to invent and develop new products and materials was lost because their commercial interests were severely damaged in overseas markets without the protection of patents. Therefore, as the first step, the U.S. tried to strengthen patent protection through the World Intellectual Property Organization (WIPO),²²⁰ but in vain, mainly due to the different positions of developed and developing countries.

²¹⁸ Devereaux, Lawrence, and Watkins (2006).

²¹⁹ Susan K. Sell (2003), *Private Power, Public Law – The Globalization of Intellectual Property Rights*, Cambridge: Cambridge University Press, p.76.

²²⁰ The World Intellectual Property Organization (WIPO) is the global forum for intellectual property services, policy, information and cooperation. It was established in 1967 and its membership is currently 188 states. The WIPO joined the United Nations system in 1974. See www.wipo.int.

Such failure to deal with IP protection in the multilateral fora made relevant U.S. industries seek other means to achieve their goal. They pushed the U.S. government to deal with IP protection in foreign countries on a bilateral basis, and the government embarked on bilateral consultations with Hungary, Korea, Mexico, Singapore, and Taiwan in 1982. This bilateral approach was conceived as fruitful by U.S. industries, as well as the government.²²¹ Afterwards, the private sector played a larger role in positioning IP issues on the U.S. trade agenda and in developing related U.S. trade policy.

Among a number of IP-related private actors, Edmund Pratt, CEO of Pfizer Pharmaceutical, and John Opel, CEO of IBM, played a pivotal role. Both served as members of the ACTPN during the Carter and Reagan administrations. Pratt was appointed by President Carter in 1979 and chaired the ACTPN from 1981, and Opel served as head of the IP task force. Through the ACTPN, they argued that IP protection should be put on the trade agenda.²²²

Throughout 1983 and 1984, more IP-related private sector entities were mobilized. In 1984, the International Intellectual Property Alliance (IIPA) was formed representing U.S. copyright-based industries, and its major member associations included the Association of American Publishers, Entertainment Software Association, Independent Film & Television Alliance,

²²¹ For more discussion on the historical process of the bilateral negotiations on intellectual property right between Korea and the U.S., see Chong Min Kim (2016), 'A Study on the ROK-US Intellectual Property Rights Agreement (1986).' Ph.D. Dissertation: Seoul National University. Kim concludes in her study that the US-ROK IPR Agreement was a case where the U.S. utilized Korea's international status as the model for developing countries in its effort to strengthen IPRs in the multilateral trade regime.

²²² Devereaux (2006), p.52.

Motion Picture Association of America, and the Recording Industry Association of America.²²³

These attempts by U.S. industries to link IP protection to trade through the advisory system and coalitions among like-minded companies finally bore meaningful fruit in 1984. Congress adopted new amendments in the Trade and Tariff Act of 1984 and made intellectual property rights actionable under Section 301 of the 1974 Trade Act. Thus, the U.S. government was now authorized to take retaliatory action against countries that deny “fair and equitable provision of adequate and effective protection of intellectual property rights”.²²⁴

Despite the possibility of unilateral retaliatory actions, the private actors were not satisfied with the domestic legislation enacted to protect IP-related interests of U.S. industries. The ACTPN formed the Task Force on Intellectual Property Rights in 1985, and the members of the Task Force were from large multinational corporations.²²⁵ The Task Force submitted a report to the advisory committee with its recommendation that the U.S. should pursue a trade-based approach in the area of IP protection. The report endorsed U.S. efforts to incorporate IP rights into the GATT framework. The Task Force also emphasized the “continuing importance of private sector-government dialogue for shoring up domestic consensus on a trade-based approach.”²²⁶

²²³ See the IIPA’s website at www.iipa.com.

²²⁴ Chapter 8 of Trade and Tariff Act of 1984, Public Law 98-573. See also Devereaux (2006), p.51.

²²⁵ Eight members included the CEO of IBM, John Opel; Vice President and Counsel of the Motion Picture Industry Association, Fritz Attaway; and president of the International Division of Merck & Company Inc, Mr. Abraham Cohen.

²²⁶ Sell (2003), p.89.

TRIPS Agreement and Role of Private Actors

Following almost a decade-long effort of private sector actors in calling for the adoption of a trade-based approach in IP protection and institutionalizing it, another attempt to include IP in the Uruguay Round of GATT talks was made. As Sell has described, private actors “pursued their interests through institutionalized access channels and appealed to both the legislative and executive branches in their quest for globalizing IP protection.”²²⁷ In March 1986, Pratt and Opel founded the Intellectual Property Committee (IPC) in order to get intellectual property onto the GATT agenda.²²⁸ They were asked by USTR Clayton Yeutter to seek business coalitions with corporations or industries of other developed countries in order to get support from other industrialized countries in including IP in the Uruguay agenda. In no time, IPC members contacted counterparts in Europe and Japan such as the Confederation of British Industries, Federation of German Industries (BDI), French Patronat, Union of Industrial and Employers’ Confederations of Europe (UNICE), and the Japan Federation of Economic Organizations (Keidanren).²²⁹ They formed a tripartite coalition and worked to convince their governments to take action in getting intellectual property on the agenda of the Uruguay Round negotiations. Pratt noted that “this joint action by the U.S., European, and Japanese business communities represented a noteworthy breakthrough in the international business community’s involvement in trade negotiations.”²³⁰

²²⁷ *Ibid.*, p.100.

²²⁸ 13 members of the IPC were Pfizer, IBM, Merck, General Electric, Dupont, Warner Communications, Hewlett-Packard, Bristol-Myers, FMC, General Motors, Johnson & Johnson, Monsanto and Rockwell International. See Devereaux (2006), p.55.

²²⁹ Sell (2003), p.104.

²³⁰ *Ibid.*, p.106.

While attempts by the trilateral coalition were being made during the Uruguay Round talks, the private actors and their governments also worked together. The IPC indicated through its report that its close relationship with USTR and other relevant executive bodies helped shape U.S. negotiating positions and proposals. Throughout the negotiations, U.S. negotiators sought advice from the IPC, IIPA, and other private actors. Pratt, being Chairman of ACTPN, served as an advisor to the official U.S. delegation at the Uruguay Round according to Section 135 of Trade Act of 1974.²³¹

The IPC, UNICE and Keidanren worked together to develop an IP code at the GATT and in June 1988, they finally presented a 100-page ‘Basic Framework of GATT Provisions on Intellectual Property’²³², which contributed to the final TRIPS Agreement. It was viewed as a product of successful trilateral collaboration among U.S., European, and Japanese business actors.²³³ Despite such efforts by the industries of developed countries, developing countries, led by India and Brazil, objected to the inclusion of IP in the GATT.

Meanwhile, the U.S. Congress passed the Omnibus Trade and Competitiveness Act of 1988, which included ‘Special 301.’ It was enacted for the purpose of strengthening the U.S.’ unilateral pressure on countries that deny adequate and effective protection of intellectual property rights to U.S. firms.²³⁴ The first victim was Brazil. USTR investigated Brazil’s computer software copyright protection and pharmaceutical patents, and Brazil finally

²³¹ *Ibid.*, p.107.

²³² The Basic Framework of GATT Provisions on Intellectual Property released by the IPC, Keidanren and UNICE in 1988 was similar to the proposals by Jacques Gorlin who was commissioned by Opel of IBM to draft a paper on a trade-related approach for intellectual property in 1985. His paper, titled as ‘A Trade-Based Approach for the International Copyright Protection for Computer Software’, became the basis of the Basic Framework abovementioned.

²³³ Devereaux (2006), p.61.

²³⁴ See Section 1303 in Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418.

created software copyright protection in its Software Law of 1987 after the U.S. increased tariffs to 100 percent on Brazilian exports of certain paper products, consumer electronics, and pharmaceutical products.²³⁵ After the dispute between the U.S. and Brazil was settled, the delegations finally adopted a declaration endorsing the applicability of GATT principles to intellectual property issues in 1989. Since this breakthrough, negotiations on intellectual property entered a new phase dominated by North-North issues among the U.S., Japan and European countries.²³⁶

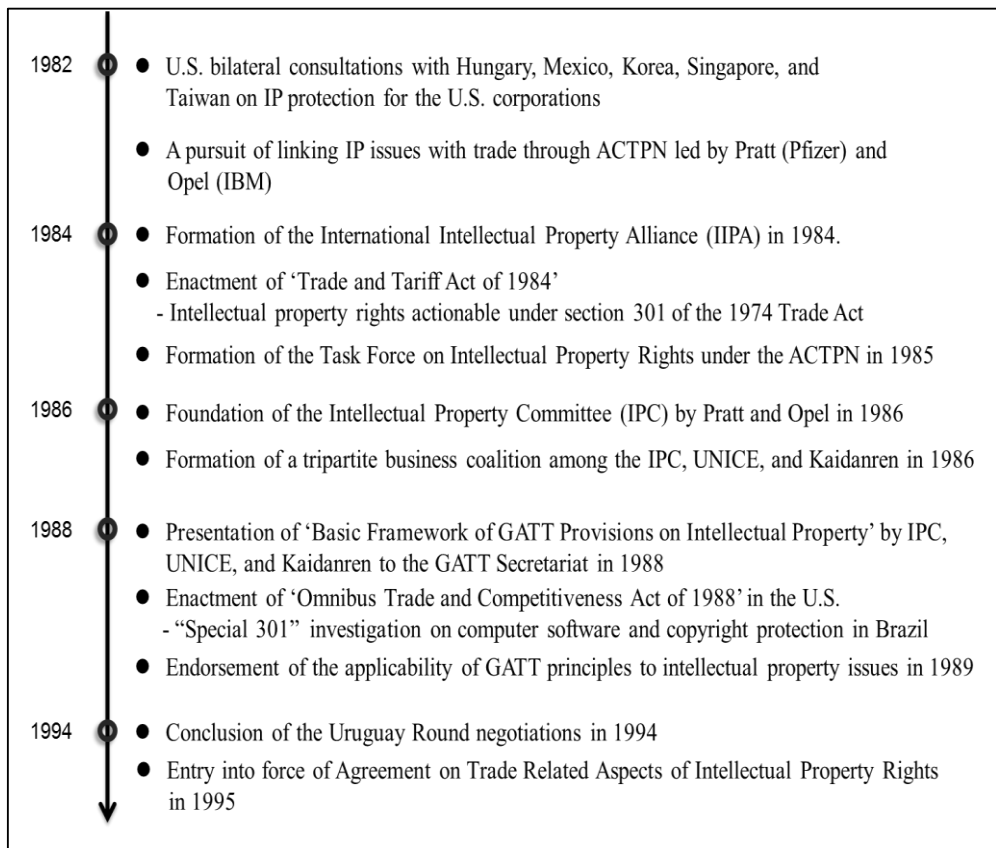
When the Uruguay Round negotiations were concluded in April 1994, Trade Related Aspects of Intellectual Property Rights was included as Annex 1C of the Agreement Establishing the World Trade Organization. The final text of the TRIPS Agreement reflected what related industries have long demanded and thus, the private actors including the IPC were satisfied with the results.²³⁷ As illustrated in Figure 7, the successful process of including IP in the Uruguay Round talks and the conclusion of the TRIPS Agreement were largely possible due to the efforts of U.S. corporations and industry alliances and also the trilateral cooperation between U.S., Japanese and European industries.

²³⁵ Devereaux (2006), p.62.

²³⁶ Sell (2003), p.109.

²³⁷ *Ibid.*, p.115.

Figure 7. TRIPS and Role of Private Actors



4.1.2 Participation of Private Actors in Trade Dispute Procedures

4.1.2.1 Section 301 of the Trade Act of 1974

As examined in the previous chapter, only states have a legal standing in the WTO dispute settlement mechanism and non-state actors cannot bring complaints to the DSB. Some scholars have claimed that the WTO dispute settlement body should expand the standing requirements to include private actors and gave a few reasons for this suggestion. The results of dispute settlements have more impact on private actors than governments. Moreover, a government sometimes decides not to bring a case for political reasons. Thus, proponents have argued that the expansion of standing at the WTO would help private actors bring more dispute settlement cases to the WTO and protect their own interests in the international arena. However, as Schneider has mentioned, it is unlikely that private actors will have direct standing in the WTO.²³⁸

In order to fill this gap between the interests of private actors and their government, the U.S. provided a legalistic procedure through which private actors could petition their government to challenge foreign trade barriers and submit a complaint to the WTO. Sections 301-310 of the Trade Act of 1974 set out a procedure for USTR to initiate an investigation and take action against foreign trade barriers in response to petitions by interested parties.

²³⁸ Schneider (2001), p.95.

Sec. 301. Actions by United States Trade Representative.

(a) Mandatory Action.-

(1) If the United States Trade Representative determines under section 304(a)(a) that-

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country-

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice...

Sec. 302. Initiation of Investigations.

(a) Petitions.-

(1) Any interested person may file a petition with the Trade Representative requesting that action be taken under section 301 and setting forth the allegations in support of the request.

(2) The Trade Representative shall review the allegations in any petition filed under paragraph (1) and, not later than 45 days after the date on which the Trade Representative received the petition, shall determine whether to initiate an investigation.

(3) If the Trade Representative determines not to initiate an investigation with respect to a petition, the Trade Representative

shall inform the petitioner of the reasons therefor and shall publish notice of the determination, together with a summary of such reasons, in the Federal Register....

According to Section 302(a)(1), investigations may be initiated in response to a petition filed by an interested party or USTR.²³⁹ When a petition is filed, USTR must determine whether to initiate an investigation not later than 45 days of its receipt. If USTR decides not to initiate an investigation with respect to a petition, it must notify the petitioner of the reasons for the negative determination and publish them on the *Federal Register*. In 2009, for example, USTR published three separate reasons for why it decided not to initiate an investigation under Section 301, with respect to a petition on Israel's protection of intellectual property rights on the *Federal Register*.²⁴⁰

If a case involves a denial of benefits to the U.S. under a trade agreement, the U.S. usually requests consultations under that agreement.²⁴¹ According to Section 303 (Consultation upon initiation of investigation), USTR must "request proceedings on the matter under the formal dispute settlement procedures provided under such agreement," if a mutually acceptable resolution is not reached before the earlier of (A) the close of the consultation period, if any, specified in the trade agreement, or (B) the 150th day after the day on which consultation was commenced.²⁴² Under the dispute settlement mechanism in the WTO, the U.S. would initially request

²³⁹ Amended by Section 304 of the Trade and Tariff Act of 1984, the Trade Representative was permitted to initiate an investigation under Section 301.

²⁴⁰ For detailed information, see a notice by the USTR on 07/02/2009 at <https://www.federalregister.gov/articles/2009/07/02/E9-15608/petition-under-section-301-on-israels-protection-of-intellectual-property-rights-decision-not-to>.

²⁴¹ Judith Hippler Bello and Alan F. Holmer (1986), 'Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments', *Northwestern Journal of International Law & Business* 7(4) Fall, p.648.

²⁴² Section 303 of Trade Act of 1974.

consultations according to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and proceed with consultations as provided in Article 4 of the DSU. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the U.S. would then request the establishment of a panel under Article 5 and Article 6 of the DSU.

4.1.2.2 Participation in the Dispute Settlement Procedure

Section 301 of the Trade Act of 1974 has been viewed as a powerful legalistic means by which the U.S. can put unilateral pressure on and even are retaliatory measures against foreign countries which deny the economic and commercial interests of U.S. corporations and industries. But rather than political controversy, this thesis highlights Section 301 as a legally institutionalized mechanism through which private actors can request their governments to initiate a dispute settlement procedure under multilateral or regional trade agreements.

Section 301 provides that private firms may petition their government to challenge foreign trade barriers and also that USTR must consult with the petitioner and other private sector representatives. In this regard, Section 303 of the Trade Act of 1974 provides that USTR must “seek information and advice from the petitioner and the appropriate committees established pursuant to Section 135 in preparing United States presentations for consultations and dispute settlement proceedings.”

In reality, when the USTR launches an investigation in response to a petition, it has no choice but to rely on assistance from petitioners or related

industries due to its lack of resources and information. For firms and industries to challenge a foreign market barrier, they must depend on their government to represent and defend their interests under a dispute settlement mechanism, and thus, must willingly cooperate with the relevant authority in the Section 301 process. In his study of this relationship between private and public actors in the U.S., Shaffer has argued that “Section 301 should be viewed as a process of public-private collaboration more focused on problem solving than on litigation.”²⁴³

Even though Section 301 allows private actors in the U.S. to have legal rights to make USTR represent and defend their interests, a petition under Section 301 is rarely filed. Rather than filing a petition, firms consult with USTR beforehand and it provides recommendations after reviewing the draft petitions. There were not many petitions which USTR has officially rejected in this approach.²⁴⁴ The last time USTR rejected a petition was in 2009, when the Institute for Research: Middle Eastern Policy (IRMEP) filed a petition, as mentioned earlier.

Even when USTR decides to file a complaint before the WTO Dispute Settlement Body and not through a petition by industry, it consults the affected industry and often relies on information and resources that the industry provides. USTR typically requires industry to submit factual and legal memoranda as a prerequisite to its filing of a WTO complaint.²⁴⁵ In addition, USTR closely works together with industry in the process of preparing written submissions and industry can indirectly participate in the dispute settlement procedure by actively assisting USTR. In *Korea – Taxes on*

²⁴³ Gregory C. Shaffer (2003), *Defending Interests: Public-Private Partnership in WTO Litigation*, Washington D.C.: Brookings Institution Press.

²⁴⁴ *Ibid.*, p.45.

²⁴⁵ *Ibid.*, p.47.

Alcoholic Beverages,²⁴⁶ for example, USTR requested assistance from the U.S. Distilled Spirits Trade Association (DISCUS) and its consultants to compare the products' physical characteristics, distillation techniques, advertising and distribution methods, consumer uses and perceptions, and price elasticities.²⁴⁷ The issue in this case was whether U.S. alcoholic beverages and Korean *soju* were directly competitive or substitutable. The appellee, including the U.S., presented the Dodwell study,²⁴⁸ which showed the elasticity of substitution among products in dispute as evidence to the panel and argued that *soju* is directly competitive and substitutable with the imported distilled alcoholic beverages. The Dodwell study was commissioned by industry and the panel finally concluded that "the Dodwell study provided useful information regarding at least the potential competitiveness of the imported and domestic products." The panel also stated that the Dodwell study was not decisive, but was helpful because its findings were consistent with other information.²⁴⁹ Likewise, such industry-commissioned studies like the Dodwell study in *Korea – Taxes on Alcoholic Beverages* shows that assistance by industry can help its government prevail in dispute settlement proceedings. As a result of the decisions made by the DSB, Korea amended its Liquor Tax Law and the Education Tax Law to impose flat tax rates on all distilled alcoholic beverages on a non-discriminatory basis.

²⁴⁶ Panel report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, 17 September 1998. On 4 April 1997, the EC requested consultations with Korea in respect of internal taxes imposed by Korea on certain alcoholic beverages pursuant to its Liquor Tax Law and Education Tax Law. The EC contended that the Korea Liquor Tax Law and Education Tax Law appear to be inconsistent with Korea's obligation under Article III:2 of GATT 1994. On 23 May 1997, the US also requested consultations with Korea in respect of the same measures.

²⁴⁷ Shaffer (2003), p.50.

²⁴⁸ The Dodwell study is a survey on 500 men between the ages of 20 and 49 from 3 Korea cities who had purchased soju in the past month and whisky in the past 3 months.

²⁴⁹ Panel report, *Korea – Taxes on Alcoholic Beverages*, paras. 10.91-19.92.

4.2 Public-Private Relationships in EU Trade Policy-making

4.2.1 Consultation with the Public

4.2.1.1 Trade Policy-making Process in the EU

The European Union (EU) is a treaty-based institutional framework, and trade policy in the EU is made according to legal provisions provided by the Treaty of Rome.²⁵⁰ As a result of the Treaty, a European common market and an institutional framework for making common economic and trade policies were established. Under the Treaty, within the European Economic Community, tariffs and quantitative restrictions on imports and exports between Member States were removed and a common customs tariff and commercial policy toward third countries were introduced. Such tasks are carried out by the European Parliament, Council, Commission, and the Court of Justice.

Article 113 of the Treaty of Rome

With regard to trade policy-making in the EU, Article 113 of the Treaty of Rome serves as the legal framework for delegating and granting trade policy authority. Article 113 sets out as follows:

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of

²⁵⁰ The European Economic Community (EEC) came into force in January 1958 as a result of the Treaty of Rome.

uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.
4. In exercising the powers conferred upon it by the Article, the Council shall act by a qualified majority.

As provided in Article 113 (now renumbered 207),²⁵¹ trade policy-making authority has been delegated from Member States to the Council, and then again from the Council to the Commission. It also sets out that the Commission must consult a *special* committee, which is now called the Trade Policy Committee (TPC, previously Article 113 Committee, and then Article 133 Committee), which consists of one representative from each Member State. The TPC plays an important consultative role and assists the Commission in trade policy decision-making in the EU, but the Committee has no voting rights and its deliberations are not published.

²⁵¹ The Article 113 was renumbered as Article 133 as a result of the Treaty of Amsterdam in 1999 and is now numbered as Article 207 in the Treaty of European Union in 2010. The scope of the common commercial policy was extended to cover not only goods but also services and intellectual property.

Trade Policy-making Process

The EU's common commercial policy is an integrated policy area under supranational competence. When it comes to bilateral, regional, or multilateral negotiations, the EU “speaks with a single voice” and the European Commission is authorized to negotiate as an agent. For understanding the EU trade policy-making process, Meunier and Nicolaidis have explained it in four stages: (1) the negotiating mandate, (2) the negotiations, (3) the ratification, (4) and the implementation and enforcement of the agreement.²⁵² Here, the first three stages will be overviewed, and the last stage will be discussed later in detail.

Negotiating mandate

The European Commission²⁵³ plays the role of executive body in the EU and has the power to propose legislations and common policies. In the area of trade, the Commission develops proposals for the initiation and content of international trade negotiations.²⁵⁴ The Directorate-General for Trade (DG Trade) is in charge of the EU's common policy on trade and trade negotiations with countries outside the EU. DG Trade also assists the EU Trade Commissioner, who is nominated by the Member States for a five-year term. In the early stages of discussions on launching trade negotiations, the

²⁵² Meunier, Sophie and Kalypso Nicolaidis (2008), ‘The European Union as a Trade Power’ in Christopher Hill and Michael Smith, *International Relations and the European Union*, 275-298, New York: Oxford University Press.

²⁵³ The term ‘Commission’ refers to both the College of Commissioners and to the institution itself. The Commission is composed of the College of Commissioners of 28 members, including the President and Vice-Presidents. The Commissioners, one from each EU country, are the Commission's political leadership during a 5-year term. Each Commissioner is assigned responsibility for specific policy areas by the President.

²⁵⁴ Raymond J. Ahearn (2002), ‘Trade Policymaking in the European Union: Institutional Framework,’ CRS Report for Congress.

Commission holds a public consultation on the content and options for the free trade agreement and conducts an assessment of the impact of the deal on the EU and on the other country.²⁵⁵

After DG Trade elaborates proposals for negotiations, a policy discussion takes place at the level of the Trade Policy Committee (TPC), which is a special advisory committee under the Treaty.²⁵⁶ The decisions are typically made by consensus, and the Commission follows the advice of the TPC. However, if the Committee amends the Commission's proposals or a member state raises an objection, the Commission should refer the matter to COREPER (EU's Committee of Permanent Representatives)²⁵⁷ which is immediately below the Council. COREPER then refers the proposal to the Council of the European Union²⁵⁸ which can grant a negotiating mandate to the Commission. A decision in the Council can be made with a qualified majority vote of 55% of countries representing at least 65% of the total EU population.²⁵⁹

²⁵⁵ The European Commission, Trade negotiations step by step, DG Trade September 2013.

²⁵⁶ The Trade Policy Committee meets weekly at either the senior level or at the deputy level. The senior members who are senior civil servants from the member states' national ministries and the director general of DG Trade ('full members') meet once a month in Brussels. At the deputy level, the TPC meets on a weekly basis. The deputies are drawn from member states' permanent representations based in Brussels. This group focuses more on technical than political issues.

²⁵⁷ COREPER is composed of the member state officials who are national ambassadors to the EU, their deputies and staffs.

²⁵⁸ The Council of the European Union consists of government ministers from each EU country and its main role is to adopt EU laws and coordinate EU policies. Together with the European Parliament, the Council is the main decision-making body of the EU.

²⁵⁹ See http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm.

Negotiations and Ratification

If the Council adopts the negotiating mandate, the Commission conducts international trade negotiations for the EU under the authority of the Trade Commissioner. During the negotiations, the TPC often meets to ensure that the Commission negotiates within the boundary of its mandate and to agree on any changes in its negotiating position.²⁶⁰ The Commission is also required to report regularly to the TPC and to the European Parliament on the progress of negotiations.²⁶¹

After the conclusion of trade negotiations, the Council approves or rejects the final text by a qualified majority vote, with the exception of some services and intellectual property negotiations where unanimity is required.²⁶² The European Parliament co-decides with the Council, but only gives consent on trade agreements through what was formerly known as the assent procedure, which is a non-legislative procedure.²⁶³ In most cases, bilateral or regional trade agreements must be ratified by the EU and also by the parliaments of the Member States, which usually takes a longer time. Therefore, the Council always decides on the temporary implementation of some parts of trade agreements that involve the EU as a whole.²⁶⁴

²⁶⁰ Meunier and Nicolaidis (2008).

²⁶¹ See Para. 3 of Article 207 of the Treat of the European Union in 2010

²⁶² Para. 4 of Article 207 in the Treat of the European Union in 2010 provides that ‘for the negotiation and conclusion in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules’.

²⁶³ The assent procedure was introduced by the 1986 Single European Act and the scope for the application of the procedure was extended afterwards. Now it usually applies to the ratification of certain agreements negotiated by the EU as a non-legislative procedure. For more detailed information about legislative powers of the European Parliament,

see <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers>

²⁶⁴ For more detailed information on trade negotiations in the EU, see Trade European Commission, Trade Negotiations step by step, DG Trade September 2013.

4.2.1.2 Consultation Channels in Trade Policy-making Process

The trade policy-making process in the EU is much more complicated than in the U.S. because the EU is not one state, but a treaty-based intergovernmental political structure. Therefore, policy coordination among Member States has been a primary concern. Nevertheless, consultation with private actors takes place at various stages of EU trade policy-making and during trade negotiations, the Commission plays a particularly important role in shaping the access of private actors to the policy-making process.²⁶⁵ Within the Commission, DG Trade plays a similar role of as Office of the USTR, not only in terms of trade policy-making, but also in the area of public consultation. However, unlike the American system, public consultation by DG Trade is less institutionalized and not legally-binding.

Institutionalized Advisory Bodies in the EU

Similar to the U.S., there are institutionalized advisory bodies established to assist the Commission, Parliament and the Council. They are the Economic and Social Committee (ESC) and the Committee of the Regions (CoR). Established by the Treaty of Rome, the ESC has acted in an advisory capacity and today, it is called the European Economic and Social Committee (EESC). The EESC's missions are: assisting the European Parliament, Council and European Commission to ensure that European policies and legislation tie in better with economic, social and civic circumstances on the ground, making

²⁶⁵ Cornelia Woll (2007), 'Trade Policy Lobbying in the European Union: Who Captures Whom?', Paper presented at the EUSA Tenth Biennial International Conference.

use of EESC members' experience and representativeness, and serving as an institutional forum representing, informing, expressing the views of and securing dialogue with organized civil society.²⁶⁶ The EESC has also changed its focus from representation of the European citizen to representation of 'the organized citizen', specifically intermediary organizations comprising civil society.²⁶⁷

The EESC now has 350 members which are drawn from economic and social interest groups in Europe. Members are nominated by national governments and appointed by the Council of the EU for a renewable 5-year term of office. The members are categorized into one of three groups: employers, workers, or various interests.²⁶⁸ The EESC's main role is to consult and advise the Commission and the Council, which is mandatory in some cases. According to the website, the EESC delivers 170 advisory documents and opinions a year on average and all opinions are forwarded to the EU's decision-making bodies and then published in the EU's Office Journal.

The Committee consists of six sections: (1) Agriculture, Rural Development and the Environment, (2) Economic and Monetary Union and Economic Social Cohesion, (3) Employment, Social Affairs and Citizenship, (4) External Relations, (5) The Single Market, Production and Consumption, and (6) Transport, Energy, Infrastructure and the Information Society. Among these sections, the External Relations section is involved in international trade. Members in charge of international trade play the role of forwarding the

²⁶⁶ See the webpage of the EESC at <http://www.eesc.europa.eu/?i=portal.en.about-the-committee>.

²⁶⁷ For a more detailed explanation of European civil society, see Stijin Smismans (2003), 'European Civil Society: Shaped by Discourses and Institutional Interests', *European Law Journal* 9(4): 482-504.

²⁶⁸ See the webpage of EESC at <http://www.eesc.europa.eu/?i=portal.en.about-the-committee>.

opinions of civil society and interest groups to policy makers during trade negotiations and in the implementation of trade agreements. Additionally, there is the Follow-up Committee on international trade for 2015 to 2017, and its main tasks are monitoring the WTO Doha Round negotiations and various bilateral trade negotiations, and addressing other international trade issues. The consultation mechanism in the EU is summarized in Figure 8.

Civil Society Dialogue

It was in the 1990s when the Commission began to pay more attention to input from private actors in trade policy. It was the time when the ‘legitimacy deficit’ issue was being strongly raised against the multilateral trade regime and also against supranational governance in the EU. In the area of trade, the Commission attempted to formalize its consultation channel with interest groups by instituting a Civil Society Dialogue. The Commission’s aim was to have a transparent and accountable trade policy based on consultations with all parts of European civil society. In accordance with its objectives, DG Trade’s Civil Society Dialogue involves regular, structured meetings to discuss trade policy issues, and the EU Commissioner for Trade or DG Trade officials attend the meetings and listen to and exchange views with the participants.

The Trade Civil Society Dialogue operates on a registration basis and non-profit organizations based in the European Union are eligible for registration. Examples of non-profit organizations are trade unions, employers’ federations, business federations and non-governmental organizations, including community-based groups and grassroots organizations that deal with trade issues. According to the DG Trade website, 452 civil society

organizations are registered in the database and a list of all the members is published online.²⁶⁹ The EU also emphasizes the importance of the transparency register to promote “integrity and legitimacy in private organizations’ relations with the European institutions.” The organizations, which want to be engaged in influencing the trade policy formulation and decision-making processes, are required to accept a Code of Conduct²⁷⁰ and provide information about their activities. Through the transparency register, all the private organizations and citizens should provide their sources for budgets, their mission and what they present.

Representatives of different groups that participate in the dialogue form the Civil Society Dialogue Contact Group, and it functions as a facilitator and sounding board. The Contact Group plays the role of enhancing transparency by circulating and disseminating information to the wider group of their constituencies on one hand, and by transmitting their suggestions on the planning and functioning of the process on the other. Registered civil society organizations can choose one of contact groups as their contact point.²⁷¹ There are two to four meetings of the Civil Society Dialogue Group a year, and the Contact Group members are required to actively participate and provide their input in the process of the Dialogue.

Within the Civil Society Dialogue, meetings on trade issues take place and these meetings allow for open dialogue and exchange of views between civil society organizations and the Commission services. Through the Civil Society meetings website, registered members can sign-up to attend a

²⁶⁹ See <http://trade.ec.europa.eu/civilsoc/search.cfm>. Accessed May 18, 2016.

²⁷⁰ See the homepage of Transparency Register at <http://ec.europa.eu/transparencyregister/public/homePage.do>

²⁷¹ The list of contact group is available at trade.ec.europa.eu/civilsoc/contactgroup.cfm#_list-of-members. Currently 12 organizations or associations are listed as contact group. Civil society organizations may decide which organizations is member of the contact group.

meeting. On the website, detailed information on each meeting including the participants, agenda, and related documents are open to the public. According to the statistics provided on the website, 710 civil society organizations and 2,436 representatives have attended at least one meeting since their registration.²⁷²

Other than the Civil Society Dialogue meetings, there are other ways for the Commission and civil society to communicate. Registered organizations can submit position papers on trade issues according to the guidelines²⁷³ and these documents are posted online. Another way to consult civil society is through ‘Your Voice in Europe’²⁷⁴ which is the Commission’s single access point to a number of consultations and feedback opportunities. Online consultations on a variety of policy issues including trade are also open periodically. On each policy issue, an online survey is conducted and the results of the survey are made available to the public.

The Trade Civil Society Dialogue has contributed to the transparency of the Commission’s trade policy and dialogue between the Commission and a number of civil society groups. It has a well-structured website and all of its documents and processes are open for public reviewing. However, unlike the U.S. Trade Advisory Committee system which is legally institutionalized, the Civil Society Dialogue is formal, but not legally binding. In addition to the Trade Civil Society Dialogue, all other consultation and dialogue channels with civil society are built on the ‘General principles and minimum standards

²⁷² See <http://trade.ec.europa.eu/civilsoc/statistics.cfm>.

²⁷³ The number of documents that each organization can contribute would be one document per month and per organization.

See the guidelines at <http://trade.ec.europa.eu/civilsoc/positionpapers.cfm>.

²⁷⁴ See “Your Voice in Europe” at <http://ec.europa.eu/yourvoice/>.

for consultation of interested parties by the Commission’ from 2002 and the Commission’s new ‘Better Regulation Guidelines’ from 2015.

General Principles and Minimum Standards for Consultation

For more transparent and consistent public consultation within the Commission, general principles and minimum standards for consultation of interested parties were provided in 2002.²⁷⁵ The general principles and minimum standards have been amended through the process of public consultation.

Four general principles that must be met for consultation between the Commission and interested parties are participation, openness and accountability, effectiveness, and coherence. Regarding ‘*participation*’, it explains that ‘consulting’ as widely as possible on major policy initiatives is necessary and clearly defines ‘consultation’ as “processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission.” *Openness* means the consultation processes by the Commission must be transparent both to interested parties and to the general public. Private actors should also be transparent and clear about which interests they represent and how inclusive that representation is, which is related to *accountability*. For policies to be *effective*, consultation with interested parties should start with the development of a policy. Since there are a number of departments within the Commission, the *coherence* and consistency of the departments’ consultation processes also count.

²⁷⁵ Communication from the Commission (2002), ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’, COM 704, 11.12. 2002.

Together with the four principles, the Commission should follow five minimum standards when it consults interested parties: (1) Clear content of the consultation process, (2) Consultation target groups, (3) Publication, (4) Time limits for participation, and (5) Acknowledgement and feedback. The key point of each standard is as follows:

- (1) All communications relating to consultation should be *clear* and *concise*, and should include all necessary information to facilitate responses.
- (2) When defining *the target group(s)* in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions.
- (3) The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be *published on the Internet* and announced at the “single access point.”
- (4) The Commission should provide *sufficient time* for planning and responses to invitation and written contributions. The Commission should strive to allow *at least 8 weeks for reception of responses* to written public consultations and *20 working days notice for meetings*.
- (5) Receipt of contributions should be *acknowledged*. Results of open public consultation should be displayed on websites linked to the single access point on the Internet.

The Commission is guided by the general principles and minimum standards when it consults on major policy initiatives. However, it is clearly indicated that neither the general principles nor the minimum standards are

legally binding. In this regard, the Commission clarifies its position through the policy document itself. The Commission gave two reasons why it set consultation standards in the form of a policy document instead of a legally binding instrument. First, there should be a dividing line between consultations launched on the Commission's own initiative before its adoption of a proposal, and the subsequent formalized decision-making process according to the Treaties. Second, a situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. In response to concerns regarding futility of the principles and minimum standards due to their non-legally binding nature, the Commission has ascertained that its departments must act according to the principles and standards that it decides to apply.²⁷⁶

New Better Regulation Guidelines

Based on the existing minimum standards for consultation, the Commission newly published the 'Better Regulation Guidelines in order to strengthen its commitment to carry out consultations. Chapter VII of the Better Regulation Guidelines deals with guidelines on stakeholder consultation. The Guidelines, based on the four principals and five minimum standards, specifically structure the consultation process into three interacting phases: (1) Establishing the consultation strategy, (2) Conducting consultation work, and (3) Informing policy-making. In each phase, several key steps are highlighted

²⁷⁶ *Ibid.*

for officials who are involved in the preparation of legislative or policy proposals.²⁷⁷

Sustainability Impact Assessments

There is another mechanism through which DG Trade provides opportunities for private stakeholders to share their views on trade negotiations. It is called Sustainability Impact Assessments (SIAs), which are a trade-specific tool for supporting trade negotiations. The purpose of SIAs is to provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental consequences of ongoing trade negotiations.²⁷⁸ According to the Handbook for Trade Sustainability Impact Assessment by the European Commission, the two main purposes of Trade SIAs are to integrate sustainability into trade policy by informing negotiators of the possible social, environmental and economic consequences of a trade agreement, and to make information on the potential impacts available to all actors (NGOs, aid donors, parliaments, business, etc.). A Trade SIA also proposes *ex-post* monitoring measures to be put in place during the trade agreement's implementation.²⁷⁹

SIAs were first developed by DG Trade in 1999 to assess the negotiations on the WTO Doha Development Agenda (DDA) and were conducted for bilateral and plurilateral trade negotiations. Once the Council gives the Commission a mandate to launch a trade negotiation, a Trade SIA is

²⁷⁷ Commission Staff Working Document (2015), Better Regulation Guidelines, SWD (2015) 111, 19.5.2015.

²⁷⁸ See EU Commission homepage

at ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/.

²⁷⁹ European Commission, External Trade (2006), Handbook for Trade Sustainability Impact Assessment. Available at <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>.

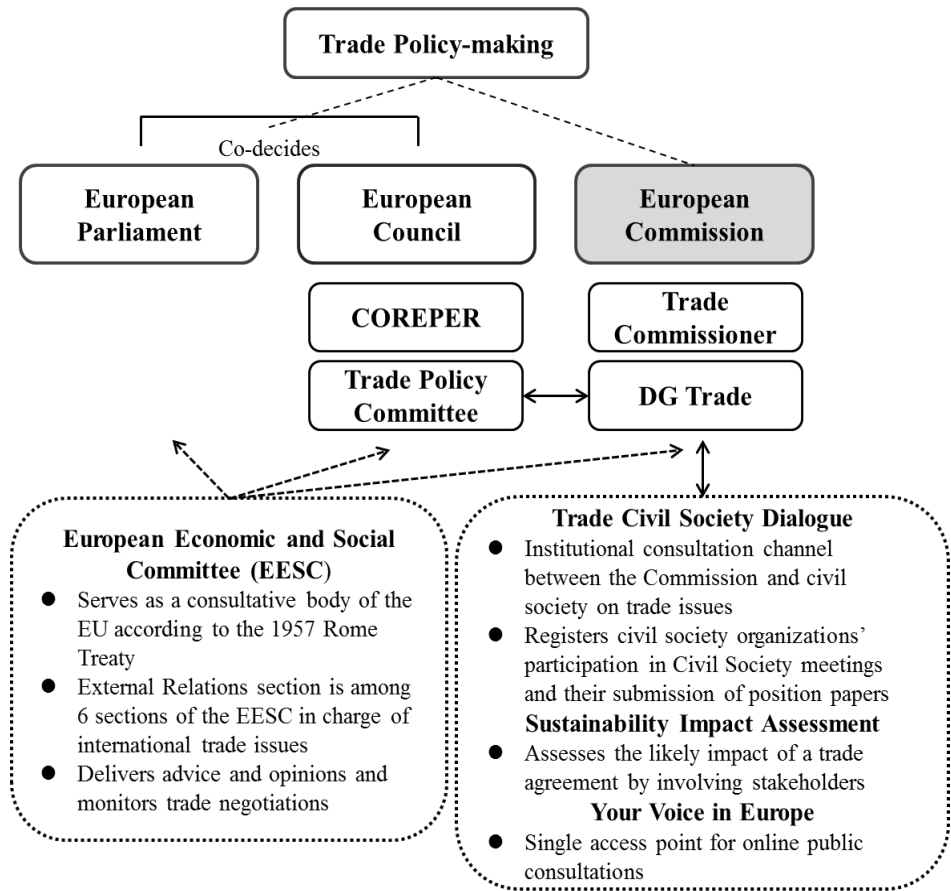
carried out and continued throughout a trade negotiation, even in the implementation stage of the agreement. Trade SIAs are conducted by external independent consultants selected by public tendering procedures. In the process, a wide range of stakeholders is consulted, which is essential to ensure involvement and legitimacy in the use of Trade SIA results. For consultation, several methods are used including email dialogue between the contractor and stakeholders, dedicated websites for publishing project reports with sections for submitting comments and contributions, and civil society dialogue meetings. It is reported that civil society in the EU has an active interest in the Trade SIA process.²⁸⁰

The European Commission is required to integrate Trade SIA results into its policy-making. The Commission prepares a position paper based on the results of each Trade SIA and includes what further analysis should be undertaken and what policy action should be implemented. The position paper is discussed with EU Member States at the Trade Policy Committee. It is then made public and presented to civil society, which the EU regards as crucial to ensure the quality, credibility and legitimacy of Trade SIAs. It is also circulated among Members of the European Parliament. All final reports of the completed assessments, inception reports and interim reports for ongoing negotiations are made public through the DG Trade website.²⁸¹

²⁸⁰ *Ibid.*

²⁸¹ See the EU Commission homepage at <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/>.

Figure 8. Consultation Channels in EU Trade Policy-making



Source: Summarized by Author

4.2.2 Participation of Private Actors in Trade Dispute Procedures

4.2.2.1 Background of Trade Barriers Regulation

As explained above, the public consultation system on trade issues in the EU is not legalized, but institutionalized in the form of a policy document. However, when it comes to trade disputes, the EU also permits private actors to request that the Commission conduct an investigation into alleged breaches by third countries of international trade rules. The EU version of Section 301 of the U.S. is the Trade Barriers Regulation (TBR). The initial version of the TBR was the New Commercial Policy Instrument (NCPI). The NCPI was enacted by the Council in 1984 in response to U.S. actions taken under Section 301 against European steel and agricultural interests.²⁸² Under the NCPI, either Member States or private parties representing a European industry could submit a complaint against trade barriers in third countries. During the period from 1984 to 1994, the Commission formally considered seven private complaints under the NCPI and initiated investigations on five cases among them.²⁸³ Since the NCPI turned out to be ineffective, there was a demand for a new regulation with more flexible procedural requirements. Finally, the Trade Barriers Regulation was enacted and entered into force on January 1, 1995.²⁸⁴

²⁸² Shaffer (2003), p.85.

²⁸³ Marco C.E.J. Bronckers (1996), 'Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulation', *Common Market Law Review* 33, pp.302-303

²⁸⁴ Shaffer (2003), p.85.

Compared to the NCPI, the TBR had changed both in substance and procedure. However, Bronckers has pointed out that the real improvement was an external factor: the strengthening of the WTO dispute settlement procedure. He argued that the NCPI was ineffective in large part due to the non-existent threat of GATT-authorized retaliation and that the stronger dispute settlement mechanism of the WTO made the TBR “a more effective weapon for European industries to remove foreign obstacles to trade.”²⁸⁵

The TBR is often likened to Section 301 of the U.S. It was commonly considered that the TBR is less powerful than Section 301 due to its narrower scope and weaker enforcement measures. While Section 301 can be used as a unilateral instrument, the TBR was designed to facilitate the submission of complaints by private actors to the WTO. Under the TBR, complaints based only on the WTO’s international trade rules were permitted, until bilateral free trade agreements between the EU and third countries were included in February 2008.

4.2.2.2 Mechanism of Trade Barriers Regulation

The TBR is “a legal instrument that gives the right to EU enterprises, industries or their associations, as well as the EU Member States to lodge a complaint with the European Commission who then investigates and determines whether there is evidence of violation of international trade rules, which has resulted in either adverse trade effects or injury.”²⁸⁶ The scope of

²⁸⁵ Bronckers (1996), p.318.

²⁸⁶ The European Commission (2008), Trade Barriers Regulation, published by the EC’s DG Trade.

application covers not only goods, but also services and intellectual property rights, which was clarified in the Treaty of Nice.²⁸⁷

There are two tracks for lodging a complaint under the TBR. Complaints can be submitted when a third country enforces a trade barrier which adversely affects exports from EU Member States or the EU market²⁸⁸.

Article 3

Complaint on behalf of the Community industry

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a *Community industry* which considers that it has *suffered injury*²⁸⁹ as a result of *obstacles to trade* that have an effect on the *market of the Community* may lodge a written complaint.

Article 4

Complaint on behalf of the Community enterprises

1. Any *Community enterprise*, or any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have *suffered adverse trade effects*²⁹⁰ as a result of *obstacles to trade* that have an effect on the *market of a third country* may lodge a written complaint.

²⁸⁷ The Treaty of Nice amended Article 133 to provide for the EC's exclusive competence over "the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property with the exceptions of trade in cultural and audiovisual services." For more detailed discussion on the EC's competence issue, see Sophie Meunier and Kalypso Nicolaidis (1999), 'Who speaks for Europe? The Delegation of Trade Authority in the EU', *Journal of Common Market Studies* 37(3): 477-501.

²⁸⁸ Council Regulation No 3286/94, OJ L 349, 31.12.1994.

²⁸⁹ *Ibid.*, 'injury' means any material injury which an obstacle to trade causes or threatens to cause, in respect to a product or service, to a Community industry on the market of the Community.

²⁹⁰ *Ibid.*, 'adverse trade effects' mean those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country...., or on a sector of economic activity therein.

The procedure that follows after the submission of complaints is divided into four phases: admissibility review, internal investigation, international dispute settlement procedure, and review of retaliation.²⁹¹ Once a complaint is lodged, the Commission has to decide whether the complaint is admissible within 45 days after the lodging. The Commission's decision to initiate an investigation will be published in the Official Journal of the EU, or the complainant will be informed if the complaint does not provide sufficient evidence. During the investigation, the Commission will seek and verify all the necessary information from interested parties. Once its examination has concluded, the Commission must report to the Committee.²⁹² The report should generally be presented within five months of the announcement of initiation of the procedure, and this period can be extended to seven months.

The examination procedure could result in the conclusion that in the interest of the Community, no action needs to be taken, in which case the procedure will be terminated. The procedure may be suspended when the third country concerned takes satisfactory steps to eliminate the obstacle to trade. If a satisfactory solution is not achieved and the investigation supports the claims of the complaint, the Commission may initiate international consultation or dispute settlement proceedings under the WTO or bilateral agreements according to procedure as shown in Table 8.


If the EU wins a case after a long period of dispute settlement proceedings under the WTO or bilateral trade agreements and the third country does not implement recommendations within the timeframe, the

²⁹¹ Marco Bronckers and Natalie McNelis (2001), 'The EU Trade Barriers Regulation comes of age', *Journal of World Trade* 35(4).

²⁹² According to Article 7 (Consultation procedure) of the TBR, an Advisory Committee that consists of representatives of each Member State, with a representative of the Commission as chairman must be set up.

Commission may propose to the Council retaliatory measures, which must be adopted by qualified majority within 30 days from the transmission of the proposal. According to the Commission, 24 TBR examination procedures have been initiated since 1996 to date. The TBR has also served as an instrument which provides private parties with indirect access to rights derived from trade agreements, and the Commission has evaluated that the TBR has been successful in yielding results for private complainants in many cases.

Table 8. TBR Proceedings

	Proceedings	Duration	Relevant article of the TBR
	Lodging of a Complaint		Article 3, 4
	Admissibility review	Within 45 days	Article 5
	Decision to initiate an examination procedure		
	Initiation		Article 8
	Examination	5~7 months	Article 8, 9, 10
	Report to TBR Committee		Article 8
	Consultations requested at WTO		Article 13
	Adoption of commercial policy measures		Article 13

Source: Marco Bronckers and Natalie McNelis (2001)

4.3 Analysis and Conclusion

By revisiting the three models of public engagement at the national level in Chapter 2, public-private relationships in trade policy-making in the U.S. and the EU will be explained under the analytical framework. Before the discussion, it should be noted that it may be an oversimplification to categorize each country under only one model among the three. In reality, it is more likely that within one country there are many layers of public

engagement from transparency and consultation, to participation. Therefore, the analysis will be based on the overall picture of public engagement in the given country.

The U.S. as a Participation Model

The U.S. has a long history of engaging private parties in its trade policy-making and most mechanisms for engagement are legally-binding by trade laws as previously discussed. The official advisory committee system was established by the Trade Act of 1974, and the Trade Priorities Act of 2015 has recently strengthened consultation with the public. Thus, public-private relationships in trade policy-making in the U.S. are firmly institutionalized by laws.

According to the models of public engagement, it seems that public-private relationships in the U.S. are close to the model of participation as summarized in Table 9. Even though the ACTPN and other sectoral advisory committees were established to provide policy advice, they serve not only as advisors but also as agenda-setters, as demonstrated in the TRIPS case. The members of the advisory committees can also attend international trade negotiations as advisors to a negotiating delegation even if they cannot speak or negotiate on behalf of the U.S. Moreover, according to the guidelines for consultation and engagement, USTR briefs trade advisory committees regarding ongoing negotiations on a regular basis and provides them with U.S. proposals in negotiations to solicit their feedback. Additionally, Section 301 of the Trade Act of 1974 allows interested parties to participate and cooperate with their government in trade dispute settlements. All these mechanisms

reveal that public engagement in trade policy-making in the U.S. closely falls in the level of participation.

Another characteristic of the U.S. system is that its public engagement is more focused on businesses rather than civil society. All public hearings or consultations are open to the public, but the advisory committees are mostly composed of businesses and business or industry representatives. This is why U.S. trade policy is criticized for being influenced by businesses and industries. This issue is closely tied to its unique political system that empowers legislators in trade policy-making. As shown in the Trade Promotion Authority of 2015, the U.S. Congress has continuously pushed USTR to enhance transparency and encourage public participation in trade policy-making.

The EU as a Consultation Model

Compared to the U.S. system of public engagement, the EU's public engagement in trade policy-making is a more principle-based and policy-based system. Even though there are institutionalized advisory bodies such as the EESC, whose role is to consult and advise the Commission and the Council, it is not a trade-oriented advisory group.

Therefore, the Trade Civil Society Dialogue serves as its representative and institutionalized channel, through which DG Trade and private actors can exchange information and views on trade policy. Even though it is not legally binding, the Dialogue functions under the 'General principles and minimum standards for consultation of interested parties by the Commission' and the 'Better Regulation Guidelines'. These principles and standards provide clear guidelines for enhancing transparency and

consultation, but do not seem to meet the participation level of public engagement. In the process of ratification, that there is no formal mechanism which provides interested parties with opportunities to present their opinions. However, at the stage of implementation, the EU also grants private parties the right to lodge a complaint regarding trade dispute settlements under the TBR. Even though the TBR was enacted after Section 301 of the U.S., it is a formal mechanism that allows private parties to participate and collaborate with the Commission in bringing a dispute to the WTO.²⁹³

In conclusion, the EU system of public engagement in trade policy-making can be categorized as a consultation model, with the exception of the TBR. Additionally, compared to the U.S., the EU places more emphasis on engaging civil society as a whole, rather than businesses or business representatives. The EU also has its strength in that mechanisms for transparency of trade decision-making processes as well as transparency and accountability of private actors are provided.

Both the U.S. and the EU have emphasized the importance of public-private relationships and developed mechanisms and systems to engage

²⁹³ It is noteworthy that, other than the U.S. and the EU, China also established its own Foreign Trade Barrier Investigation (TBI) mechanism in 2002, one year after its accession to the WTO. The mechanism functions under the “Investigation Rules of Foreign Trade Barrier.” In this regard, refer to Henry S. Gao (2010), ‘Taking Justice Into Your Own Hand: The TBI Mechanism in China’, *Journal of World Trade* 44(3): 633-659. Gao examines the background for its establishment and the substantive and procedural requirements for investigations under TBI. He also reviews the Japan-Quantitative Restrictions on Laver case which was brought under the TBI. The case study reveals that the reason why the TBI has been rarely initiated is partly due to lack of direct access to the government by private firms in China. Unlike in the U.S. and the EU, the Chinese government has not been very receptive to demands from private firms and thus, the private firms have tried to find their own solutions not depending on their government. Another reason is that industry associations which represent the interests of private firms are lacking in China. The official English text of Investigation Rules of Foreign Trade Barrier is downloaded at the homepage of the Ministry of Commerce People’s Republic of China, <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045730.shtml>.

private actors in trade policy-making. Even though the U.S. and EU systems of public engagement are categorized respectively under the Participation and Consultation Model according to the framework, it is difficult to evaluate which is better than the other. This is because the difference results from various factors such as the political system, social and cultural context, administrative practices, and bureaucratic culture. Even though some aspects of the U.S. system may be considered better, the EU may not emulate the US mechanism due to its treaty-based institutional framework, weakness of the EU Parliament, and unique business culture. Therefore, the EU has developed its own method of engaging private actors with a focus on consultative function. Its related administrative policy and principles, as well as how they are implemented are transparently provided online. Thus, for countries seeking to establish new mechanisms for public engagement in trade policy-making, the EU approach may be more pragmatic than the U.S.

Table 9. Public-Private Relationships in Trade Policy-making in the U.S. and EU

	EU as a Consultation Model	U.S. as a Participation Model
Rule-making (Negotiations)	<ul style="list-style-type: none"> • Role of the EESC as an advisor • Holds Trade Civil Society Dialogue • Exchanges views through meetings on a registration basis • Opens private actors' position papers to the public online • Conducts sustainability Impact Assessment before and during negotiations 	<ul style="list-style-type: none"> • Role of advisory committees as agenda-setters • Briefs advisory committees on ongoing negotiations • Provides of U.S. proposals for feedback from advisory committees
Ratification	n/a	<ul style="list-style-type: none"> • Reports by advisory committees on results of negotiations • USITC's impact assessment based on public hearings
Implementation (Dispute settlement)	<ul style="list-style-type: none"> • TBR 	<ul style="list-style-type: none"> • Section 301 of Trade Act of 1974

Source: Author's analysis

Chapter 5

Public-Private Relationships in Trade Policy-making in Korea

5.1 Background of Trade Policy-making in Korea

5.1.1 Trade Policy-making Process in Korea

5.1.1.1 Evolution of Trade Policy-making Mechanism

Korea has been one of the representative countries whose economy has rapidly developed with heavy dependence on trade over a relatively short period of time. Korea is also exemplified as a good model for developing countries since Korea escaped from poverty by adopting an open trade policy after the Korean War.²⁹⁴ Korea's trade has expanded quickly compared to other developing countries, and now its total trade volume ranks within the ten largest trading countries in the world. No one can deny that Korea's export-oriented trade policy from the 1960s and onward contributed significantly to its expansion of trade.

Korea has been a member of GATT since April 14, 1967 and a strong supporter of the multilateral trade system. However, in line with the proliferation of regional and bilateral free trade agreements from the late 1990s, Korea also began to pursue free trade agreements (FTA). Chile was

²⁹⁴ Mike Moore, the previous director-general of the WTO, has stated in a speech at the London School of Economics in June 2000 that "Take south Korea. Thirty years ago, it was as poor as Ghana; now it is as rich as Portugal.....What these fortunate countries have in common? Openness to trade."

chosen as its first FTA partner in 1998 and the negotiations between the two countries were concluded in 2002. Up until now, Korea has concluded 14 free trade agreements with 51 countries including the U.S., China, EU, India, ASEAN, Chile, Turkey, Peru, Australia, and New Zealand.

Under the GATT/WTO system, the functions of trade policy-making were not unified within the Korean government until the late 1990s. The Ministry of Foreign Affairs(외교부), Ministry of Finance and Economy(재정경제원), and the Ministry of Commerce and Industry(통상산업부) were all involved in trade policy under a coordinating body called the ‘Coordination Committee for Foreign Economic Policies(대외경제 조정위원회),’ chaired by the Minister of Finance and Economy. Under this system, there were many inter-agency conflicts among the relevant ministries and furthermore, the Coordination Committee lacked political mandate and was ineffective as a coordinating body.

In addition to the internal necessity of transforming the trade policy-making system, the external environment in the late 1990s also demanded a more unified and efficient trade-making mechanism in Korea. Korean companies were faced with a major disadvantage in the late 1990s, as the rest of the world began entering into preferential trade agreements. Thus, the Korean government was pressed to conclude FTAs and simultaneously accelerate its restructuring process to overcome the Asian Financial Crisis in 1997. In response to both its internal and external demands, then-president Kim Dae-jung set up the Office of the Minister of Trade (OMT) under the Ministry of Foreign Affairs and Trade in 1998 and unified the functions of trade policy-making, which had previously been distributed among ministries. In 2001, the Ministerial Meeting on Foreign Economic Policies

(대외경제장관회의),²⁹⁵ which is in charge of coordinating and reviewing external economic policies including trade, was also established under the Ministry of Strategy and Economy(기획재정부) in the form of a Presidential decree.²⁹⁶

The Korean government has been rather defensive in terms of trade policy, because Korea was often a target for anti-dumping investigations of developed countries and also Section 301 investigations.²⁹⁷ However, by pursuing FTAs since the late 1990s, the Korean government established more proactive and sometimes aggressive trade policies, particularly with regard to bilateral trade negotiations. Furthermore, severe controversy and social conflict during the negotiations on its first free trade agreement with Chile, which lasted from 1998 to 2002, showed that procedures for concluding trade treaties had to be developed. Therefore, for the first time in the history of Korea's trade policy, the 'Administrative Rule on Procedures for Conclusion and Implementation of Free Trade Agreements (자유무역협정체결절차규정)' was adopted as a Presidential Directive in June 2004. The Administrative Rule

²⁹⁵ The Meeting consists of Minister of Strategy and Economy (기획재정부장관), Minister of Science, ICT and Future Planning(미래창조과학부장관), Minister of Foreign Affairs(외교부장관), Minister of Agriculture, Food and Rural Affairs(농림축산식품부장관), Minister of Industry, Commerce and Energy(산업통상자원부장관), Minister of Environment(환경부장관), Minister of Land, Infrastructure and Transport(국토교통부장관), Minister of Oceans and Fisheries(해양수산부장관), Officer for Government Policy Coordination(국무조정실장) and Senior Secretary to the President for Economic Affairs (대통령비서실 경제정책 보좌 수석 비서관).

²⁹⁶ The Korean legislative system consists of the Constitution as the paramount law, Acts to realize the constitutional notions, and administrative legislation including Presidential Decrees, Ordinance of the Prime Minister, Ordinances of Ministries and so forth to effectively implement the Acts. See National Law Information Center at <http://www.law.go.kr/eng/engAbout.do?menuId=3>.

²⁹⁷ For more information on Korea's trade policy in 1980s, see 박운서 (1988), *통상마찰의 현장*, 서울: 매일경제신문사. The book was written by a Korean trade official, Woonseo Park, who was involved in various trade negotiations between Korea and developed countries such as anti-dumping cases and MFA. It's a useful documentation of how the Korean government responded to trade frictions and how the trade negotiations took place in 1980s when Korea was a major target of pressure by developed countries.

served as a procedural framework for concluding FTAs until 2012, when Korea enacted the Act on Governing Procedures of Conclusion and Implementation of Trade Treaties (통상조약의 체결절차 및 이행에 관한 법률).

In 2013, there was also a transfer of responsibility over trade policy within the government agencies. In most countries, there are no agencies that function like USTR in the U.S. or the Directorate-General for Trade in the EU. It is common for a trade department or an agency which is responsible for trade negotiations to be located within either the ministry of foreign affairs or the ministry of industry. This has also been the case for Korea. From 1998 to February 2013, the OMT within the Ministry of Foreign Affairs and Trade was in charge of trade policy and trade negotiations, but since 2013, this responsibility has been taken over by the Ministry of Trade, Industry and Energy (MOTIE).

5.1.1.2 Institutionalized Trade Policy-making Process

Act on Governing Procedures for Conclusion and Implementation of Trade Treaties (Trade Treaty Conclusion Procedure Act)

MOTIE is the body currently in charge of trade policy and trade negotiations in Korea. When concluding trade treaties, MOTIE must follow the procedure outlined in the Trade Treaty Conclusion Procedure Act. The introduction of legislation was a rare and unprecedented attempt at the time.²⁹⁸ The scope of

²⁹⁸ Jaemin Lee (2012), 'Korea's FTA Drive and Enactment of Trade Treaty Conclusion Procedure Act of 2011 – Its Legal Implications and Practical Consequences-', *Seoul International Law Journal* 19(1), p.33.

the term ‘Trade Treaty’ is defined in Article 2 as a multilateral, regional or bilateral trade treaty whose purpose is the comprehensive liberalization of Korea’s market.²⁹⁹

In the pre-negotiation phase, Article 6 of the Act provides that the Minister of MOTIE must develop a plan for concluding a trade treaty including: the objectives and key contents of the negotiations, the schedule and expected effects of the negotiations, and a review of outstanding issues and preparation of responses for the negotiations. Once a plan is established, it must be immediately reported to the Committee of Trade, Industry and Energy(산업통상자원위원회) in the National Assembly. MOTIE is also required to hold public hearings to seek the opinions of interested parties and experts according to Article 7. Additionally, Article 9 provides that the economic feasibility of concluding such a trade treaty must be reviewed before trade negotiations are initiated.

During the negotiations, MOTIE must report to the Committee of Trade, Industry and Energy in case an important part of the plan for concluding the treaty is changed. The Committee may suggest its opinion in response to the report and the government should reflect the feedback unless there is a special reason not to (Article 10 of the Act).³⁰⁰ Once the negotiations are concluded, an impact assessment should be conducted, including the overall effects on the national economy, finance, domestic industries, and employment according to Article 11. After signing the trade treaty, the main contents of the treaty should be reported to the Committee and made open to

²⁹⁹ Act on Governing Procedures of Conclusion and Implementation of Trade Treaties, Korean Act No. 11717, enforced on 23 March 2013. ‘Trade Treaty’ also covers other treaties which liberalize Korea’s market in the fields of economy and commerce and thus, significantly affect national economy.

³⁰⁰ Article 10 provides that the report to the National Assembly should be immediate, but MOTIE could make a report after such change in case of there is a reason for delay of reporting.

the public. The government must also request for the ratification of the treaty by the National Assembly according to Article 60(1) of the Constitution of the Republic of Korea.³⁰¹ Before the implementation of the treaty, MOTIE is required to hold a briefing session for stakeholders according to Article 14 of the Act to inform them of the major contents of the treaty and to seek their cooperation.

Decision-making Process for Concluding a Trade Treaty

To promote more comprehensive and efficient trade policy-making and negotiations, the Rule on the Establishment and Operation of the Trade Steering Committee (통상추진위원회의 설치 및 운영 등에 관한 규정) was introduced in the form of a Presidential directive. This Committee consists of Vice Ministers of related ministries and is chaired by the Minister of Trade, Industry and Energy. Its responsibility is to review and deliberate on the basic plans and strategies related to negotiating and implementing trade treaties, including plans for concluding trade treaties according to Article 6 of the Trade Treaty Conclusion Procedure Act. Under the Committee, working-level meetings are held among high-level government officials from relevant Ministries and are chaired by the Deputy Minister for Trade.³⁰²

In the preliminary stage of planning for the conclusion of a new trade treaty, the Committee reviews the basic plan and strategy for the negotiations and requests the Ministerial Meeting on Foreign Economic Policies to deliberate and vote on the plan and strategy (Article 8 of the Rule). Once they

³⁰¹ When requesting ratification to the National Assembly, the followings should be submitted: (1) the results of the impact assessment, (2) estimated expenses for implementing trade treaty and source of revenue, (3) compensation package for domestic industries, and (4) new legislation or amendment of existing laws that is required for implementing the trade treaty.

³⁰² Rule on Establishment and Operation of Trade Steering Committee, Presidential Directive No. 319, enforced on 24 September 2013.

are approved by the Ministerial Meeting, a working-level meeting under the Committee has to conduct a feasibility study on the trade treaty (Article 9 of the Rule). If the result of the feasibility study supports the effectiveness of the treaty, the Committee must deliberate on the necessity of the treaty and the specific plans for its conclusion (Article 10 of the Rule). The Committee must then request for deliberation and a vote by the Ministerial Meeting and simultaneously submit the result of the public hearings held according to Article 7 of the Trade Treaty Conclusion Procedure Act (Article 11 of the Rule). For the Ministerial Meeting to decide on the initiation of the treaty, more than half of the members should be present and more than two thirds of the present members should vote affirmative.³⁰³

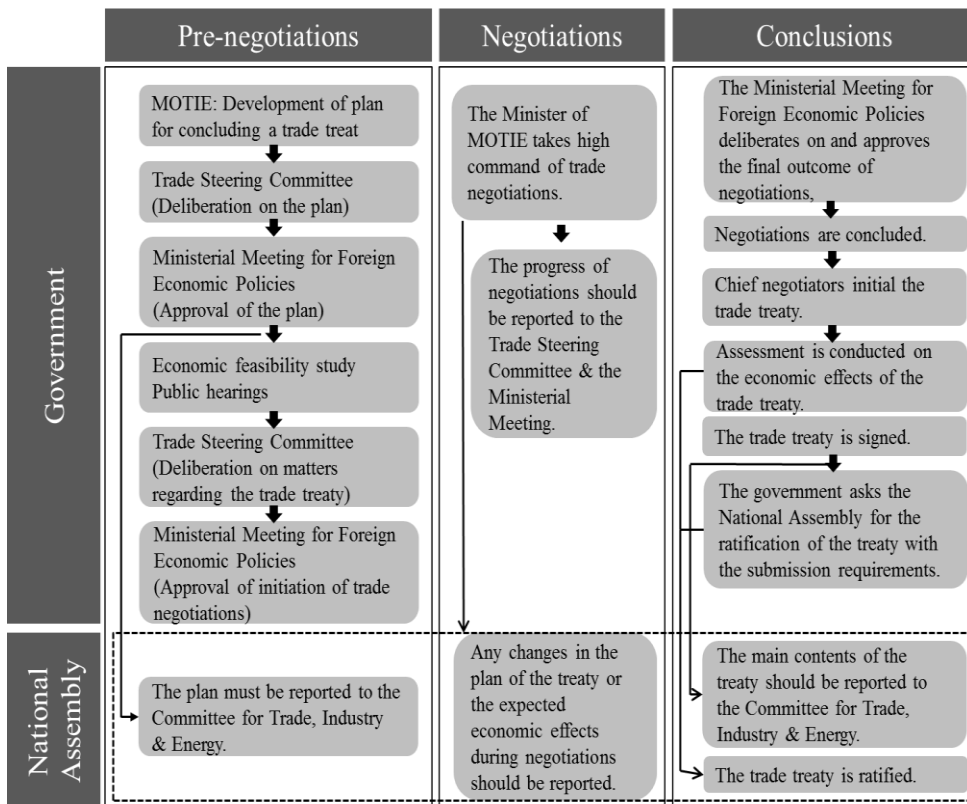
When the decision to initiate negotiations is made, the Committee deliberates on the negotiation plan of the trade treaty (Article 14 of the Rule), and the Chair of the Committee takes high command of the negotiations and reports to the Committee and the Ministerial Meeting during the negotiations. The Chair must request the Ministerial Meeting to deliberate and vote on the final results of the negotiations (Article 15 of the Rule).

After the final outcome of the negotiations is approved by the Ministerial Meeting, the chief negotiator substantially ends the negotiations by initialing the trade treaty (Article 16 of the Rule). Once the treaty is initialed, an impact assessment must be conducted by government-funded or related research institutions according to Article 11 of the Trade Treaty Conclusion Procedure Act. After signing the treaty, the government must ask the National Assembly to ratify it by submitting results of the impact assessment, compensatory measures for domestic industries, and a list of new

³⁰³ Rule on the Ministerial Meeting on Foreign Economic Policies, Presidential Decree No. 24494, enforced on 5 April 2013. See Article 6 of the Rule.

legislations or amendments of existing laws necessary for implementing the trade treaty. Figure 8 shows how a trade treaty is planned, negotiated, and concluded in Korea, and how the government and the National Assembly interact in the process according to relevant laws and rules.

Figure 9. Process of Concluding a Trade Treaty in Korea



Source: Summarized by Author

5.1.2 Public Engagement in Trade Policy-making in Korea

Trade policy-making in Korea was, for a long time, considered to be exclusively in the hands of the administrative body. While the Korean economy grew based on a government-initiated development strategy, its trade policy-making process was led by a small group of trade officials and thus, unknown to the public for the most part. In this regard, Choi has criticized that public opinion tended to be biased towards mercantilism or protectionism, because it was formed not through due procedure but mainly by domestic producers who had to compete with imports as a result of trade policy. He also indicated that trade policies were made on an *ad-hoc* basis within a relatively short period of time without national consensus-building, and also lacked transparency and democratic process which caused unnecessary misunderstanding and distrust.³⁰⁴ Such criticism gained weight especially during the Uruguay Round negotiations when Korea experienced major social conflict and turmoil.

It took Korea about a decade to enhance transparency and institutionalize a due procedure for seeking public opinion by adopting the Administrative Rule on Procedures for Conclusion and Implementation of Free Trade Agreements in 2004. This attempt was successful mainly due to Korea's first-hand experience of the difficulties encountered during the ratification of the Korea-Chile FTA.³⁰⁵ The process of the Korea-Chile FTA ratification had revealed that the lack of engaging stakeholders in the initial

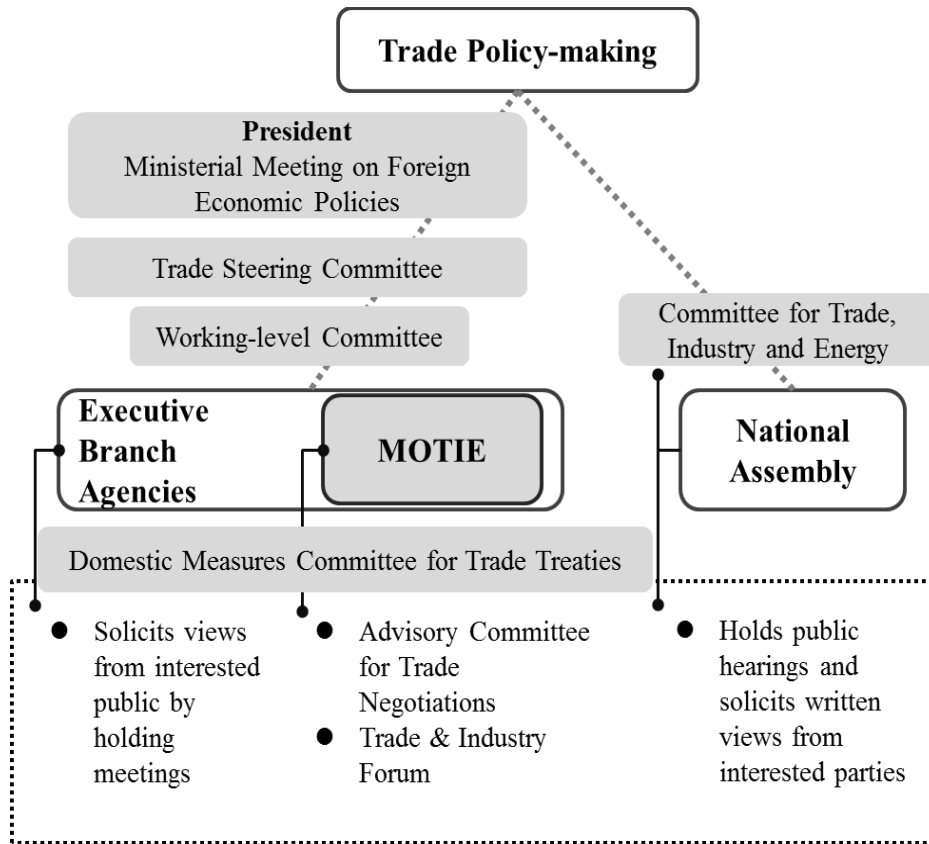
³⁰⁴ 최병선 (1996), '통상행정체제의 개편방안', *행정논총* 34(1).

³⁰⁵ For more detailed information on the whole process of the Korea-Chile FTA, see 한국농촌경제연구원, 대외경제정책연구원 (2004), *한-칠레 FTA 백서*, 서울: 한국농촌경제연구원, 대외경제정책연구원.

stage of FTA negotiations could cause severe opposition from farmers and their associations, but at the same time, not generate enough support from the manufacturing sectors. During the ratification process, interested parties in the agricultural industry became strong veto players demanding a compensation package and even the legislation of a special law on FTA implementation. The Korea-Chile FTA was finally ratified in February 2014 upon the enactment of the ‘Special Act on Assistance to Farmers, Fishermen, Etc. Following the Conclusion of Free Trade Agreements (자유무역협정 체결에 따른 농어업인 등의 지원에 관한 특별법)’.³⁰⁶ Having gone such an arduous process with the Korea-Chile FTA, the Korean government recognized the need to set a rule for engaging private parties. The Administrative Rule on Procedures for Conclusion and Implementation of Free Trade Agreements, which was introduced in 2004, provided a formal mechanism for engaging private parties. The Rule existed in the form of a Presidential Directive until the Trade Treaty Conclusion Procedure Act was enacted as law in 2012. An overview of public engagement in trade policy-making in Korea is provided in Figure 10.

³⁰⁶ The legislation for assisting specific stakeholders as a result of a trade agreement with a certain country was unprecedented and therefore was initially opposed by some government agencies.

Figure 10. Public Engagement in Trade Policy-making in Korea



Source: Summarized by Author

5.1.2.1 Government-initiated Consultation Mechanism

Article 1 of the Trade Treaty Conclusion Procedure Act clarifies that its objective is to enhance transparency in concluding trade treaties by promoting people's understanding and participation, and to contribute to the sound development of the national economy by securing Korea's rights and interests in implementing such treaties. For better transparency, Article 4 of the Act provides that, upon request, information regarding procedures for the conclusion and implementation of trade treaties must be disclosed according to the Enforcement Decree of the Official Information Disclosure Act. There are some exceptions where such a request could be rejected: when the party or parties to the treaty request the non-disclosure of information that is closely related to its or their national interests, and when the disclosure of such information could hamper national interests or encumber ongoing trade negotiations.

For the purpose of seeking opinions from private parties and experts, MOTIE is obliged to hold public hearings before a plan is drafted to conclude a trade treaty. Additionally, Article 8 of the Act states that anyone may submit his or her opinion on trade treaties or trade negotiations to the government, and the government should endeavor to reflect them in its policy when such opinions are deemed substantially reasonable. However, the actual operation of public hearings and the submission of opinions do not seem to satisfy the purpose of obligating the engagement of private parties in trade policy-making. According to Article 7 of the Act, public hearings should be held before a plan for a new trade treaty is established, but in many cases, they have been held purely as a formal procedure for initiating new trade

negotiations. Therefore, opposing parties to trade treaties have tried to block public hearings to prevent the launch of negotiations.

Advisory Committee for Trade Negotiations (통상교섭민간자문위원회)

According to Article 21 of the Trade Treaty Conclusion Procedure Act, the Advisory Committee for Trade Negotiations (통상교섭민간자문위원회) was established under the Minister of MOTIE. The Advisory Committee consists of less than 30 members including one chairperson and all members are appointed by the Minister of MOTIE. The requirements for the members are: (1) those who have sufficient knowledge and experience in international economy and trade, (2) those who can represent diverse opinions with regard to trade policy and trade negotiations, (3) those who are recommended by the Committee for Trade, Industry and Energy of the National Assembly, and (4) others who are recommended by heads of central administrative agencies. The term for members is two years and meetings of the Advisory Committee are held when summoned by the Minister of MOTIE.

The Advisory Committee may appear similar to the ACTPN in the U.S., but the composition of members is very different. Currently, most members of the ACTPN are CEOs of corporations or representatives of industry associations, and only one member is a researcher. On the other hand, among the current 29 members of the Advisory Committee in Korea, 22 members are professors or researchers from government-sponsored research institutions and only 4 members are representatives of businesses: the Vice Chairmen of the Korea International Trade Association (KITA), Federation of Korean Industries (FKI), Korea Chamber of Commerce and Industry (KCCI), and the Korea Federation of Small and Medium-sized Enterprises

(KBIZ).³⁰⁷ Meetings have been held on average once or twice a year, and a total of 7 meetings have been held to date.

Domestic Measures Committee for Trade Treaties (통상조약 국내대책위원회)

As Korea experienced severe social conflict in the process of negotiating the Korea-U.S. FTA, the Support Committee for the Conclusion of the Korea-U.S. FTA(한미 FTA 체결지원위원회) was set up on an *ad-hoc* basis in 2006, and was later expanded to become the Domestic Measures Committee for FTAs(FTA 국내대책위원회) in 2007.³⁰⁸ This has now been replaced by the Domestic Measures Committee for Trade Treaties (통상조약 국내대책위원회).³⁰⁹ The Committee is composed of less than 40 members including two co-chairpersons³¹⁰ and its members are either vice ministers of relevant ministries or private members who represent business, academia, labor unions, agricultural associations and civil society. The term for private members is one year, which can be extended.

The purpose of the Committee is to aid the conclusion and ratification of trade treaties with public support and to deliberate on domestic compensatory measures with regard to trade treaties. The scope of its deliberation covers the following: (1) issues of opening information to the public and gathering public opinion with regard to the conclusion of trade

³⁰⁷ A new list of members of the Advisory Committee for Trade Negotiations was published on 1 February 2016. See press release for the 7th meeting of the Advisory Committee for Trade Negotiations

at http://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=157969&bbs_cd_n=81.

³⁰⁸ For more detailed information on the process of the Korea-US FTA, see 김현종 (2010), 김현종, *한미 FTA 를 말하다*, 서울: 홍성사. Also see 최석영 (2015), *최석영의 FTA 협상노트*, 서울: 박영사.

³⁰⁹ Rule on the Committee for Domestic Measures for Trade Treaties, Presidential Decree No. 26703, enforced on 10 December 2013.

³¹⁰ One chairperson is the Minister of MOTIE and the other chairperson is one from private parties appointed by the Minister of MOTIE.

treaties, (2) issues of coordinating social conflict related to the conclusion of trade treaties, (3) provision of support for the National Assembly regarding trade treaties, (4) provision of domestic compensatory measures related to trade treaties, and (5) issues of strengthening the competitiveness of domestic industries and improving domestic institutions as a result of trade treaties.

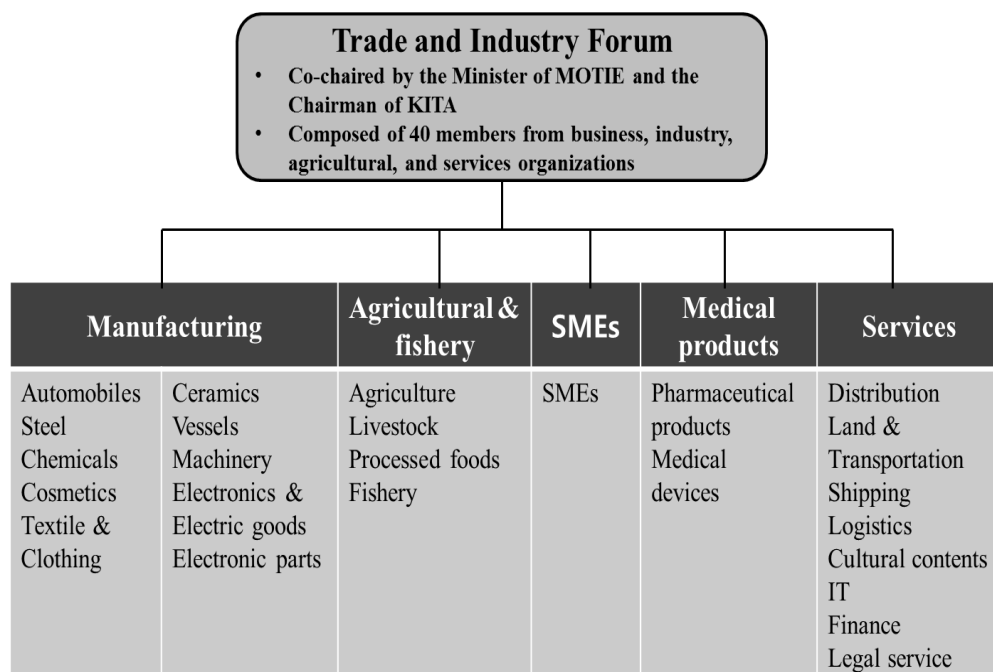
The Committee currently consists of 18 members from the government and 19 members from the private sector. Among the 19 private members, 8 members are professors and 10 members are representatives of business organizations or industry associations. Committee meetings are held once a year, but its deliberative function is no longer operational.

5.1.2.2 Trade and Industry Forum (통상산업포럼)

After MOTIE took charge of trade policy-making and trade negotiations in 2013, it has emphasized that consultation channels with industries should be strengthened in the process of trade policy-making. Therefore, in May 2013, MOTIE set up the Trade and Industry Forum (통상산업포럼), following the model of the sectoral technical advisory committee system in the U.S. The Forum is co-chaired by the Minister of MOTIE and the Chair and CEO of the Korea International Trade Association (KITA), which is a private organization that represents Korean trading companies. The Forum consists of 40 members including presidents of 12 industry associations, 3 representatives of SMEs, 4 representatives from the agricultural and fishery sectors, 4 representatives from the medical industry, and 10 representatives from the service industry. Within the Forum, there are 25 sectoral advisory meetings as illustrated in Figure 11, and these meetings are attended by members from industry

associations, businesses, research institutions and government ministries. The Forum and the sectoral advisory meetings are operated by KITA and a total of 84 meetings have been held since May 2013. However, there are no set relevant rules or guidelines under which the Forum operates.

Figure 11. Structure of Trade and Industry Forum



Source: Secretariat of Trade & Industry Forum

5.2 Analysis of Public-Private Relationships in Trade Policy-making in Korea

As mentioned earlier, Korea has concluded 14 free trade agreements with 51 countries. Before Korea was actively engaged in free trade agreements, its trade policy-making process was state-centered and there was no systemic channel for public engagement. However, its past experiences of social conflict and disorder during negotiations notably with Chile and the U.S. highlighted the need to establish and formalize mechanisms for engaging interested parties from the pre-negotiation stage. As a result, the Korean government has made various attempts to build better public-private relationships in trade policy-making and now has legally-binding or formal mechanisms in place as shown in Table 10.

Table 10. Public-Private Relationships in Trade Policy-making in Korea

	Korea as a ‘Transition-to-Consultation Model’
Rule-making (Negotiations)	<ul style="list-style-type: none"> • <i>Advisory Committee for Trade Negotiations</i> • Public hearings • Meetings with stakeholders held by relevant authorities on an <i>ad-hoc</i> basis • Trade and Industry Forum
Ratification	• <i>Domestic Measures Committee for Trade Treaties</i>
Implementation (Dispute settlement)	• Informal request and consultation

Source: Author’s analysis

First, Korea has enacted the Trade Treaty Conclusion Procedure Act, which is regarded as an unprecedented legislation on procedures for concluding trade agreements. It is meaningful in that the Act provides a

procedural framework for planning, negotiating, concluding, and implementing trade agreements. It also has strengthened engagement by legislators in the process of trade negotiations from its initiation to implementation. Aside from the controversy on the allegedly excessive participation by the National Assembly under the Act, the monitoring role of legislators and direct involvement by private parties cannot be treated equally.

Therefore, it is noteworthy that the Act also prescribes public engagement in the process of decision-making. Under this law, the Advisory Committee for Trade Negotiations, which consists of trade experts and private actors, was created under the auspices of MOTIE. However, the current composition of the Advisory Committee, of which the majority are professors or researchers reveals that the Committee seems to seek more knowledge and expertise on trade policy rather than the actual views and opinions of interested parties who are likely to be most affected by trade policy. Public hearings for soliciting stakeholders' opinions are also, by law, required to take place before a plan for a new trade treaty is established. However, in many cases, public hearings were held immediately before the announcement of the initiation of negotiations on a new trade agreement and became no more than a formality in the process of trade decision-making.³¹¹

The establishment of the Trade and Industry Forum was welcomed in the beginning, but many of the sectoral meetings under the Forum are now being routinely held only as part of a routine procedure, the opinions and

³¹¹ The Korean government planned to hold a public hearing for a Korea-US FTA on 2 February 2006 right before the announcement to initiate negotiations on the Korea-US FTA on 3 February 2006. The public hearing was blocked by farmers' groups because the fact that the Korean government had already decided to announce the initiation of negotiations was revealed. In case of the Korea-China FTA, the public hearing was held on 24 February 2012 before the initiation of negotiations was announced on 2 May 2012. It was also interrupted by farmers' groups in the middle of the hearing.

views that are raised during the meetings are not efficiently forwarded to the negotiators. Therefore, the channels for engaging interested parties and stakeholders have become *ad-hoc* meetings respectively held by relevant authorities. Under this system, diverse or often conflicting views and opinions of stakeholders cannot be effectively exchanged and thus, it is more difficult to achieve a consensus or even a mutual understanding.

Whenever Korea concluded a free trade agreement with countries which are competitive in the agricultural and fishery sectors, the ratification process was either delayed or stalled. As in the case of the Korea-Chile FTA, exemplified by Mansfield and Milner in Chapter 2, many compensation packages have been provided for veto players including farmers and fishermen in the ratification process. This shows why the Domestic Measures Committee for Trade Treaties was established. Its primary function is to aid the conclusion and ratification of trade agreements with public support and to deliberate on domestic compensatory measures. The composition of the Committee is, however, problematic in terms of the members' representativeness. Moreover, the Committee itself does not play a role in deliberating on, or even in exchanging views on compensatory measures for trade agreements. On the contrary, the Committee's obligation to submit compensatory measures for domestic industries to the National Assembly at the ratification stage under the Trade Treaty Conclusion Procedure Act is often taken advantage of by veto players and politicians whom they collaborate with.

At the implementation stage, unlike the U.S. and the EU, Korea does not provide private parties with the right to petition their government to act on trade dispute settlements. The current practice allows businesses or industry

associations to informally contact and consult the relevant authority if they are affected by unfair practices of other countries, and the decision to bring a case to the dispute settlement system of the WTO is completely up to the authority.

In conclusion, the mechanism for public engagement in Korea has developed since its involvement in free trade agreements. The Korea-Chile FTA was thus, a critical turning point for Korea to shift from a state-centered model to an open state-centered model, which helped enhance transparency in its trade policy-making process. The advisory system and public hearings were also established right after the entry into force of the Korea-Chile FTA, but it seems the true importance of the mechanism was not fully recognized until the Korea-U.S. FTA negotiations began. When the Korea-U.S. FTA negotiations revealed that the lack of transparency and efforts to engage stakeholders and interested parties could cause severe controversy and social conflict, the Korean government began placing greater emphasis on seeking the opinions and advice of private parties before and during trade negotiations. However, the consultation system did not operate well during the negotiations of another significant trade agreement, which was between Korea and China. In particular, since the Ministry of Trade, Industry and Energy took in charge of trade policy in 2013, its coordinating role among various stakeholders from the agriculture to manufacturing sectors was weakened. The general evaluation is that Korea was very effective in protecting its agricultural and fishery products, while the interests of its manufacturing sectors were not as well-reflected in the Korea-China FTA.³¹²

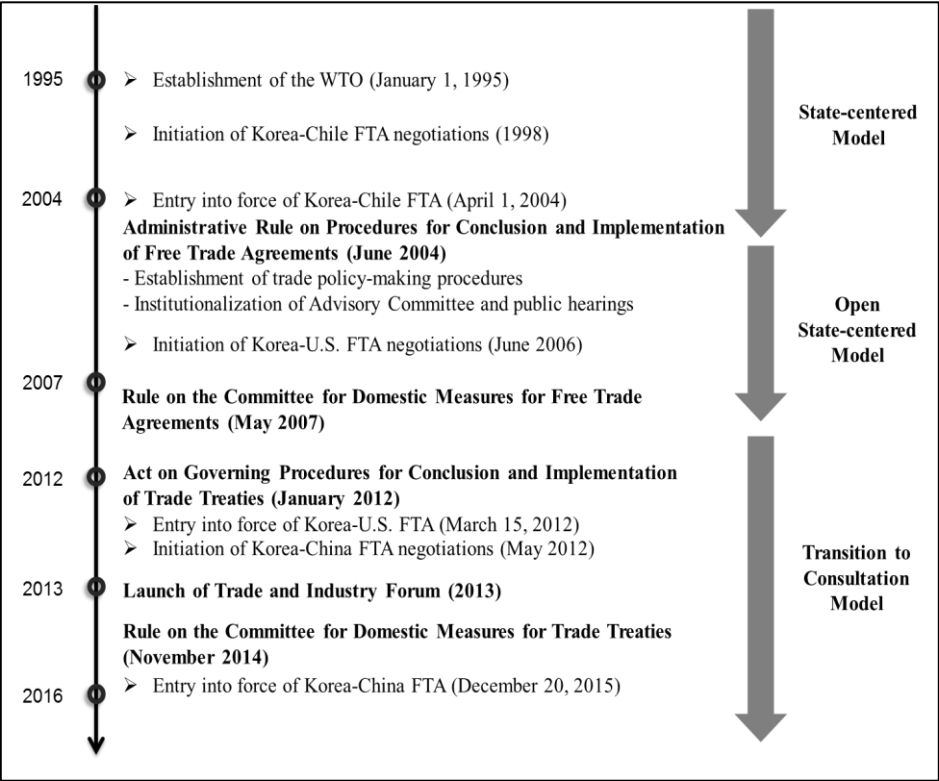
³¹² As a result of the Korea-China FTA, Korea protected most of its agricultural and fishery products, 70.2% on a product line basis and 40% on an import amount basis in the forms of partial reduction, TRQ, and exclusion. For the summary of the Korea-China FTA, see 한국 FTA 상세설명자료 at http://www.fta.go.kr/webmodule/_PSD_FTA/cn/doc/1_description.pdf

Korea's current public engagement in trade policy-making can be described as 'a transition-to-consultation' model as shown in Figure 12. As a result of efforts in formalizing its mechanisms for fostering better public-private relationships, there has been much progress in terms of transparency in trade policy-making. However, even though the mechanisms for engaging interested parties have been institutionalized by law or presidential decree, they have not fully reached the level of consultation and are not being effectively utilized by the government. This is why the Korean government still provides veto players with compensatory package in order to change their positions toward an international trade agreement at the last minute of ratification. The government also offered excessive compensatory measures to the agricultural and fishery sectors for the ratification of the Korea-China FTA. In this regard, even Jonghoon Kim, chief negotiator of the Korea-U.S. FTA negotiations criticized the compensation package and commented that it is not clear whether the benefits of the Korea-China FTA will exceed the amount of the compensation package.³¹³

Likewise, the analysis of public-private relationships in Korea provides the implication that its mechanisms for public-private relationships and the government's real motivation and willingness to engage private actors are more important than the mere institutionalization of such mechanisms. Additionally, when it comes to the legislation of a procedural framework on trade policy-making, the Trade Treaty Conclusion Procedure Act demonstrates that a more cautious and meticulous approach is needed.

³¹³ Jonghoon Kim was a Chief Negotiator during the negotiations on the Korea-US FTA and was elected as a lawmaker in 2012. He agreed, in principle, that the Korea-China FTA should be ratified, but he raised his concern that the amount of the compensatory measures far exceeds the officially estimated amount of negative effects on domestic agricultural and fishery production. See the newspaper article of 아시아경제, '김종훈, 한중 FTA 찬성했지만 "본전 생각날 것"' at <http://view.asiae.co.kr/news/view.htm?idxno=2015120112352996459>.

Figure 12. Changing Models of Public Engagement in Korea



Source: Author's analysis

Chapter 6

Conclusion

In an ever more globalized and pluralized world, engaging private parties in the process of trade policy-making is not a matter of ‘why’, but an issue of ‘how’. Decision-making in the area of international trade at both the international and national levels has long been entrusted to a club-like group of trade officials and a few developed countries. However, as trade expanded and its scope pervaded into rules and regulations which had not been deemed trade-related in the past, the capacity of trade officials and also the efficiency of the system’s club-like governance were challenged. At the international level, the legitimacy-deficit of the WTO was discussed in terms of its transparency. At the national level, on the other hand, governments in international trade negotiations realized the need to engage interested parties, which are most affected by the results of trade agreements, in the process of trade policy-making.

In recognition of the importance of public engagement in trade policy making at the international and national levels, there have been many discussions and studies on this issue, especially in relation to transparency in the WTO. Compared to the discourse at the multilateral level, the issue of public engagement at the national level has only recently been highlighted and country-specific mechanisms have been observed in multiple case studies. However, despite the importance of the issue and academic interest, it seems there has been a relative lack of analyses on public-private relationships in trade policy-making under any kind of framework. This is the main reason why this study attempts to suggest a framework: to view and examine various

levels of public engagement both in the international and national arena. The framework for three models of public-private relationships based on the levels of public engagement in particular can be applied for various purposes.

At the international level, the analysis based on the framework suggests that many efforts to engage private parties including business and civil society have continuously been made after the establishment of the WTO, but they still remain on the level of transparency. Although the submission of *amicus curiae* briefs, which allow public participation in dispute settlement procedures, have been fairly accepted, the consensus to reflect this practice in the DSU text has not been reached among WTO Member states. Moreover, many countries still strongly oppose *amicus curiae* briefs arguing that such public participation cannot be allowed in the intergovernmental trade regime. However, while the WTO is lingering on the level of transparency, many regional trade agreements, which are also intergovernmental in nature, have already included in the texts, provisions that prescribe the opening of panel hearings and acceptance of *amicus curiae* briefs.³¹⁴ Due to the long stalemate of the Doha Round negotiations, the issue of public engagement at the WTO is being debated less and less. Nevertheless, it will be reignited once the WTO picks up the momentum and attention is paid to its policy-making process again.

This study also examined the mechanisms for engaging non-state actors in the U.S. and EU, which are both major actors in international trade, but with its own method of public engagement. Based on the models of public

³¹⁴ Trans-Pacific Partnership (TPP) also includes a provision of engagement with interested persons in Chapter 25 regarding regulatory coherence. According to Article 25.8 (Engagement with Interested Persons), “the Committee shall establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence.”

engagement suggested by this study, public-private relationships in U.S. trade policy-making can be categorized as the participation model. Most mechanisms for public engagement in the U.S. have been developed in the form of laws. The advisory committee system, which was established under the Trade Act of 1974, aims to mainly facilitate consultation, but also occasionally contributes to agenda-setting in trade policy-making as shown in the process of the TRIPS Agreement. Additionally, through Section 301 of the Trade Act of 1974, public and private parties have collaboratively responded to foreign trade barriers that affect U.S. economic interests. On the other hand, the EU's public engagement in trade policy-making seems to focus mainly on transparency and consultation with principle-based and policy-based mechanisms. Even though public-private relationships in the EU are not legally binding, trade officials and non-state actors exchange information and views on trade policy in a transparent manner through the Trade Civil Society Dialogue. The EU also provides almost the same rights as the U.S. to interested parties in petitioning for dispute settlements through the Trade Barriers Regulation. However, the overall picture of public engagement in the EU seems to be more close to the consultation model.

Unlike the U.S. and the EU, Korea is a country which has only recently recognized and developed public-private relationships in trade policy-making. Korea's economy and trade has grown mainly by state-centered initiatives and plans and thus, the need to engage private parties in trade policy-making has not been recognized for a long time. However, ever since Korea became involved in regional free trade agreements, it began to establish rules on trade policy-making procedures to enhance transparency and formal mechanisms to consult private parties. Therefore, it can be said

that Korea has shifted toward open state-centered model since Korea's first FTA with Chile. Upon experiencing severe conflict and turmoil in the process of negotiating the Korea-U.S. FTA, the Korean government made further attempts to increase public engagement by amending its rules on governing procedures for trade treaties by enacting it into law in 2012. Thus, Korea's public engagement in trade policy-making has made much progress in terms of transparency in the recent years. However, Korea's negotiations on the Korea-China FTA revealed that its consultation mechanisms did not function properly and as a result, an excessive compensation package for the agricultural and fishery sectors was offered to push through ratification. This is why this study categorizes public-private relationships in Korea as the transition-to-consultation model.

In conclusion, this thesis has made a contribution by suggesting an analytical framework for studying public-private relationships in trade policy-making at the international and national levels. It also demonstrated that examinations and analyses of public engagement in trade policy-making based on the framework can provide meaningful implications. If the framework is applied for comparative analysis among country-specific case studies of public-private relationships in trade policy-making, more findings and implications can be drawn. For more useful application, the framework will need to be further improved with future research and studies because it is still in an early stage of development. In addition, an evaluation framework to assess how the mechanisms of public-private relationships at each level of public engagement match with the ultimate goals of the relationships will also have to be developed in the long run.

Non-state actors are directly affected by trade policy shaped by governments both at the international and national levels and over time, they have become increasingly involved in borderless and diverse economic issues, which governments cannot address on their own. In this sense, this study is expected to bring more attention on the issue of public-private relationships in trade policy-making, and that further analyses and studies on this topic will ensue in the future.

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ABSTRACT (in Korean)

국가간 및 국내 통상정책은 직접적인 영향을 미치는 주체는 기업 및 기타 민간의 영역인 반면, 이러한 통상정책을 수립하고 국가간 통상협상을 대리하는 유일한 행위자는 정부라는 주체-대리자간 불일치의 근본적 문제를 내포하고 있다. 통상협상의 주요 목적이 관세장벽 완화였던 GATT 체제 초기에는 정부가 통상정책의 유일한 행위자로 인정되었으며, 다자간 통상협상은 소수 선진국 클럽에 의해 비밀스럽게 진행되었다. 그러나 국가간 무역이 크게 확대되면서 한 국가의 경제뿐 아니라 세계경제의 무역 의존도가 높아지고 무역의 범위가 전통적인 상품무역에서 서비스 및 무역과 관련된 모든 규범으로 확장되면서 통상정책의 결정과정에 대한 관심이 증폭되었다. 1960년대 이후 민주주의와 국제화의 확산을 통해서도 통상정책 결정과정의 투명성과 민간의 역할에 대한 요구가 높아졌다. 또한 1990년 후반부터 전 세계적으로 확산된 지역무역협정은 이전까지 WTO 차원에서 큰 역할을 하지 못 했던 신흥개도국 내부적으로 통상정책 및 통상협상에 대한 민간의 관심이 증대되는 중요한 계기가 되었다.

이러한 배경하에 국제적 그리고 국내적 차원의 통상정책 결정과정에서 민관의 관계가 변모해왔다. 국가마다 서로 다른 속도와 모습으로 발전해왔지만 통상정책 결정과정에서 민관 관계의 궁극적인 목적은 공통적으로 정책 결정과정의 합법성과 투명성을 제고시키고, 사회적 후생을 최대화하는 한편, 사회적 갈등과 비용을 최소화하면

서 최적의 자원 배분을 달성하는 것이다.

지금까지 다자간 무역협정인 WTO 차원에서나 국가 차원에서 통상 정책 결정과정에서 정부와 민간의 관계에 대한 논의가 지속되었음에도 불구하고 체계적인 연구를 위한 분석의 틀이 충분히 제시되지 못했다. 따라서 본 연구는 통상정책 결정과정에서의 민관의 역할을 분석적으로 조망할 수 있도록 국가간 통상협상이 수반되는 통상정책 결정과정인 협상, 비준, 이행의 세가지 단계별로 민간의 개입 정도인 투명성, 자문, 참여의 세 가지 수준으로 구분하는 분석틀을 제시하고 있다. 이는 국가 차원의 통상정책 결정과정의 민관의 관계를 국가별로 또는 국가의 발전단계별로 투명성 제고에 초점이 맞추어진 ‘개방형 국가 주도 모델,’ 민간의 자문 역할에 중점을 둔 ‘자문형 모델,’ 그리고 민간의 적극적인 역할이 강조되는 ‘참여형 모델’로 구분한 분석 틀로 확장될 수 있다.

이러한 분석틀을 기반으로 국제적 차원의 통상정책 결정과정에서의 민관의 관계를 분석해본 결과, 대표적으로 WTO는 시애틀 각료회의 실패를 교훈 삼아 민간의 참여를 위한 여러 제도를 마련했음에도 불구하고 협상 및 이행단계에서 여전히 투명성 제고의 단계에 머물러 있는 것으로 보인다. 연례 최대 민간 주도 행사인 Public Forum을 통해 기업뿐 아니라 NGO 등 시민사회와의 대화채널을 강화하고 있으나 국가간 정책결정에의 영향력은 간접적이고 제한적인 것으로 평가된다. 또한 이행단계에서는 WTO 패널과 항소기구에서 분쟁 당

사국들의 요청시 공청회를 공개하고 *amicus curiae* 제출을 제한적으로 허용하고 있지만 아직까지 이러한 관행은 분쟁해결절차 협정문에 반영되지 못하고 있는 실정이다. 한편, 미국 또는 EU 주도의 지역무역협정은 이미 분쟁해결절차 과정에서의 공청회 공개와 *amicus curiae* 제출 허용을 명시적으로 협정문에 반영하였다.

통상대국인 미국은 통상정책과 협상을 전담, 총괄하는 무역대표부라는 독특한 시스템을 유지하고 있으며, 오래 전부터 통상정책 결정과정에서 민간의 참여를 법으로 제도화하였다. 공식적인 민간 자문위원회의 역할은 통상정책 결정과정에서의 ‘자문’을 넘어서 통상어젠다를 제시하고 통상협상 결과에 대한 의견을 제시하는 등 적극적인 ‘참여’의 수준으로 평가될 수 있다. 또한 미국의 1974 통상법 301조는 외국의 무역장벽에 의해 미국 기업의 이익이 침해될 경우 민간이 직접 정부에 대해 다자간 또는 양자간 분쟁해결절차에 회부하도록 하는 청원권을 보장하고 있다. 한편, EU는 미국과 달리 법적인 제도화보다는 정책적 차원 또는 행정 원칙을 통해 민관의 관계를 정립해왔으며, 이는 적극적인 참여형 보다는 자문형에 가까운 것으로 분석된다. EU 집행위원회의 통상담당 총국이 민간과의 대화 및 자문을 위해 수립한 ‘시민사회 다이얼로그’와 통상뿐 아니라 모든 정책결정 과정에 적용되는 ‘자문을 위한 일반 원칙 및 최소 기준’은 EU의 자문형 민관 관계를 보여주는 대표적인 제도이다. 그러나 통상정책 이행단계에서는 EU도 미국의 통상법 301조와 유사한 TBR을 통해 민간의 직접적인 분쟁해결절차 청원권을 보장하

고 있다.

한국은 무역을 통해 경제발전을 이룩한 대표적인 국가이며 오랫동안 WTO 다자간 무역체제를 지지해왔다. 그러나 지난 10여년 간 자유무역협정을 활발하게 체결하는 과정에서야 비로서 통상정책 과정에서 민관 관계 정립의 중요성을 인식하게 되었다. FTA체결 과정에서 사회적 갈등과 소요를 경험하면서 통상정책 결정과정의 투명성을 제고시키기 위해 ‘통상절차법’을 제정하고 자문위원회 설치, 공청회 개최 등 민간의 개입을 법제화하였다. 또한 통상협정의 원활한 국내 비준을 위해 민관 합동의 ‘통상조약 국내대책위원회’를 설립하였다. 그러나 이러한 노력에도 불구하고 제도의 내용적인 측면에서 부분적으로 문제점이 드러나고 있다. 실제 시행되는 과정에서 FTA 공청회와 같이 민간을 개입시키는 제도가 요식행위에 불과한 경우가 발생하거나 통상협정 비준 과정에서 여전히 피해 예상 부분에 대한 과도한 보상이 이루어지고 있다. 따라서 한국의 통상정책 결정과정에서의 민관의 관계는 아직 ‘자문형 모델로의 이행’ 단계인 것으로 평가된다.

이와 같이 본 논문이 제시한 분석의 틀은 다자간무역체제 및 개별 국가들의 통상정책 결정과정에서 민관의 관계 정립을 위한 제도적 발전 및 그 수준을 점검하는데 유용하며 국가간 비교 분석에도 활용될 수 있다. 또한 향후 통상정책 결정과정에서의 민관 관계에 대한 보다 체계적인 연구의 발전에 단초를 제공한다는 데 의의가 있다.